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Supreme Court, U.S.
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No. 91-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SHMUEL DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. In Garrett v. United States, 471 U.S. 773 (1985), on the facts there involved, this Court held that Congress intended, and the Double Jeopardy Clause therefore permits, separate punishments for Continuing Criminal Enterprise and its underlying series of predicate drug offenses.

(a) Is Garrett still good law, even though under the Sentencing Reform Act and the Anti-Drug Abuse Acts of 1986 and 1988, a total punishment is now allowed, and called for, on the CCE conviction which accounts for all of the defendant's relevant conduct?

(b) Is the Garrett holding applicable where, in contrast to that case, the CCE did not continue in time beyond the underlying series of offenses, and all counts are charged and tried together?

(2) May an appellate court uphold the application of an enhancement under the United States Sentencing Guidelines on a fact-bound basis not considered or relied upon by the district court?

(3) Is the specific provision of Title III which permits after-the-fact minimization of wiretapped foreign language conversations only if "an expert" in the language is "not reasonably available during the interception," 18 U.S.C. § 2518(5), violated when federal agents make no attempt to locate a Hebrew language translator in the Boston area or anywhere in the United States, instead deciding for "security" reasons to obtain assistance from Israel, causing delay which results in the Hebrew conversations' being intercepted and recorded without any minimization at all?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (Shmuel David and the United States). Petitioner had five codefendants at trial in the district court: Eliahu Abramson, Efraim Natanel, Yehuda Yarden, Jaime Toro Aristizibal, and Amparo Toro Aristizibal. Abramson was acquitted, and all of the others with the exception of Natanel were parties to petitioner's appeal to the First Circuit. Jaime Toro Aristizabal has petitioned this Court separately for certiorari under Docket No. 91-6098. Undersigned counsel understand that Yarden has submitted a petition which has not yet been docketed.

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REASONS FOR GRANTING THE WRIT

1. The court below misapplied Garrett v. United States, 471 U.S. 773 (1985), to permit cumulative conviction and sentencing where a defendant's Continuing Criminal Enterprise does not continue in time beyond the date of indictment for the CCE's predicate offenses, and despite subsequent, critical changes in the federal drug and sentencing laws. 24

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SHMUEL DAVID respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on July 29, 1991, as to which petitioner's petition for rehearing with suggestion for rehearing in banc was denied on September 27, 1991, upholding petitioner's convictions and sentences for CCE and substantive drug offenses under the Sentencing Reform Act and prior law.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit, filed on July 29, 1991, is published as United States v. David, 940 F.2d 722 (1st

Cir. 1991). It is Appendix A to this petition. The Order of the court of appeals denying the petition for panel rehearing, reprinted at the end of the published opinion, 940 F.2d at 743-44, is also part of Appendix A. The Order of the court of appeals denying rehearing en banc is Appendix B. The pertinent parts of the Memorandum and Order of the district court denying, inter alia, petitioner's motion to suppress the contents of and evidence derived from intercepted wire communications, is Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit affirming the petitioner's convictions and sentences for CCE and substantive predicate drug offenses was entered on July 29, 1991. The Court of Appeals'

Order denying petitioner's petition for rehearing with suggestion for rehearing in banc was entered on September 27, 1991. By Order dated December 17, 1991, under Docket No. A-432, Justice Souter granted petitioner's timely filed application for an extension of time within which to file this petition for writ of certiorari, to and including February 24, 1992. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, codified at 18 U.S.C. §§ 2510-2521, provides, in pertinent part:

> **§ 2515. Prohibition on use as evidence of intercepted ... oral communications**
>
> Whenever any ... oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... in or before any court ...of the United States ... if the disclosure of that information would be in violation of this chapter.
>
> **§ 2518. Procedure for interception of ... oral ... communications**
>
> * * * *
>
> (5) * * * Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language is not avail-

able or a code is not reasonably available during the interception period, minimization may be accomplished as soon as practical after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

* * * *

(10)(a) Any aggrieved person in any trial ... before any court ... of the United States ... may move to suppress the contents of any ... oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that --

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * *

Between 1970 and October 12, 1984,

21 U.S.C. § 848 provided:

Continuing criminal enterprise

(a) **Penalties; forfeitures.** (1) Any person who engages in any continuing criminal enterprise shall be sentenced to a term of imprisonment

which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2);

* * * *

(b) **"Continuing criminal enterprise" defined.** For purpose of subsection (a), a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this title of title III the punishment for which is a felony, and

(2) such a violations is a continuing series of violations of this title or title III--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which a person obtains substantial income or resources.

(c) Suspension of sentence and probation prohibited. In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and [parole provisions] shall not apply.

* * * *

(Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 408, 84 Stat. 1265.)

After its amendment by the 1984 Comprehensive Crime Control Act, and the Anti-Drug Abuse Acts of 1986 and 1988, 21 U.S.C. § 848 provided:

> **Continuing criminal enterprise**
>
> (a) **Penalties; forfeitures.** Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed greater of that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual, or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 413 of this title [21 U.S.C. § 853]; ....
>
> (b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if--
>
> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several administrators, organizers, or leaders; and
>
> (2)(A) the violation referred to in subsection (d)(1) involved

at least 300 times the quantity of substance described 401(b)(1)(B) of this Act [21 U.S.C. § 841(b)(1)(B)], or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 401(b)-(1)(B) of this Act [21 U.S.C. § 841(b)(1)(B)].

(c)**"Continuing criminal enterprise" defined.** For purpose of subsection (a), a person is engaged in continuing criminal enterprise if--

(1) he violates any provision of this title of title III the punishment for which is a felony, and

(2) such a violations is a continuing series of violations of this title or title III--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which a person obtains substantial income or resources.

(d) **Suspension of sentence and probation prohibited.** In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), shall not apply.

(e) **Death Penalty** ....

* * * *

(As amended Oct. 12, 1984, P. L. 98-473, Title II, § 224(b)[(c)], Ch. 111, Part B, § 305, 98 Stat. 2030, 2050; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, § 1005(b)(2), Subtitle F, §§ 1252, 1253, 100 Stat. 3207-15; Nov. 1 1988, P. L. 100-690, Title VI, Subtitle N, § 6481, Title VII, Subtitle A, § 7001, 102 Stat. 4382, 4387.)

During 1988, the U.S. Sentencing Commission Guidelines provided, in pertinent part:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level:

* * * *

(b) Specific Offense Characteristic

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

* * * *

Commentary

* * * *

Application Notes:

* * * *

3. Definitions of "firearm" or "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions.) * * * The enhancement also applies to offenses the reference §2D1.1, i.e., §§2D1.2-2D1.4. The adjustment is to be applied even if several counts were involved and the weapon was present in any of them.

STATEMENT OF THE CASE

This petition arises from a case involving the distribution of cocaine in Massachusetts, the Southern District of Florida, and elsewhere in and outside of the United States, from August 1986 until

April 28, 1988. Shmuel David, the petitioner, was convicted after a jury trial of, inter alia, several substantive distribution counts and a continuing criminal enterprise ("CCE") charge which used the distributions as predicates.

a. Procedural History

By superseding indictment returned on September 15, 1988, in the United States District Court for the District of Massachusetts, petitioner Shmuel David and 13 other individuals were charged with various drug offenses. Petitioner was charged in 22 of the 27 counts: two counts of conspiracy in violation of 21 U.S.C. § 846, 14 substantive counts of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), a continuing criminal enterprise, prohibited by 21 U.S.C. § 848, and

unlawful use of a telephone, contrary to 21 U.S.C. § 843(b).

On November 17, 1988, petitioner's trial counsel filed a motion to suppress the contents of and evidence derived from intercepted wire communications occurring over a particular telephone number. Additionally, petitioner joined in the motion to suppress of codefendant Natanel. On February 21-23, 1989, a hearing before U.S. District Judge John J. McNaught was held on the pretrial motions of several codefendants. At the hearing, one of the bases for suppression advanced by codefendant Natanel was that the government violated Title III, 18 U.S.C. § 2518(5), by failing to make reasonable efforts to minimize the contents of Hebrew-language conversations pursuant to the wiretap, at least 16 days after it began the interception.

The government had sought and received authorization to tap petitioner's telephone on February 17, 1988. The government argued that it had determined that it had to seek Hebrew-language interpreters who were police officers from Israel, rather than any interpreter from the United States, for the reasons that it needed someone who spoke "common, everyday Hebrew" rather than biblical Hebrew, and because it did not know the scope of the drug conspiracy which created security considerations. The affidavit of DEA agent Doherty stated that as of the date the intercept was authorized, agents were in the process of attempting to obtain the interpreter through law enforcement agencies in Israel. On March 1, 1988, the officers arrived in Boston and on March 5 they

began being used as monitors. Between February 17 and March 5, 1988, the DEA taped the Hebrew conversations in full, regardless of character or content, without minimization. The district court denied petitioner's motion without elaboration by Memorandum and Order filed March 14, 1989, which stated only "This motion is denied." Appx. C; Mem.Ord. 3/14/89, at 5.

Petitioner's jury trial (McNaught, J., presiding), along with five codefendants, began on April 5, 1989, and ended with a jury verdict on May 31, 1989. Petitioner was convicted on all counts in which he was charged.

On August 1, 1989, the district court imposed sentence upon petitioner, consisting of 30 years' imprisonment and a fine of $500,000 on Count 17 (contin-

uing criminal enterprise); 20 years' imprisonment on each of Counts 1 and 2 (conspiracy); and terms of four, 15, and 30 years on the various other counts, plus three years' special parole and a five-year term of supervised release. All the sentences run concurrently.

In sentencing petitioner David, the court applied a two-level upward adjustment under United States Sentencing Comm'n Guidelines ("USSCG") § 2D1.1(b)(1) for possession of a firearm "during commission of the offense." The court stated that the adjustment was based on evidence that a gun was held to the head of petitioner's courier, Eli Filin, and that "the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that David was responsible for its use ...."

Petitioner David and four codefendants appealed their convictions and sentences. The appeal of codefendant Natanel was decided separately, United States v. Natanel, 938 F.2d 302 (1st Cir. 1991). By Opinion filed July 29, 1991, the court of appeals (Selya, J., with Campbell and Cyr, JJ.), affirmed all defendants' sentences, but vacated petitioner's two convictions for conspiracy (Counts 1 and 2) on the ground that conviction and sentencing on these counts, which were used as predicate acts to prove the continuing criminal enterprise, constituted a violation of petitioner's Double Jeopardy protection against cumulative punishment. Appx. A; 940 F.2d at 738.

Relying on this Court's decision in Garrett v. United States, 471 U.S. 773

(1985), the court of appeals rejected petitioner's argument that his conviction and sentencing on the substantive distribution counts violated his Double Jeopardy rights, where he had also been convicted and sentenced of a coterminous CCE in the same trial. Id. at 738-39.

As to petitioner's appellate argument that the government failed to properly minimize its wiretap pursuant to the requirement of 18 U.S.C. § 2518(5), the court of appeals held that the government had made "reasonable, good-faith efforts" to satisfy the minimization requirement, 940 F.2d at 730, so that its after-the-fact minimization complied with the statute, and that the government did not need to show "that contemporaneous minimization was an utter

held that the minimization that was eventually performed was reasonably done. Id.

In upholding the two-level upward adjustment for use of a firearm applied by the district court in calculating petitioner's sentence, the court of appeals reviewed the evidence and stated that:

> the evidence obviously supports the finding that David was responsible for the gun's use, whether or not he actually held the gun himself. It was perfectly reasonable for the sentencing judge to conclude that, in brandishing a firearm (or causing one to be brandished) while trying to retrieve a stolen consignment of cocaine, David was furthering the substantive offense related to that shipment.

Id. at 742.

Although petitioner argued in his brief in the court of appeals that the district court had imposed the two-level

district court had imposed the two-level adjustment for the gun on the basis of its use in a pre-guidelines substantive drug-distribution count, he also asserted that the district court could not have imposed the adjustment in connection with the CCE count, for the reason that the CCE guideline in effect at the time of petitioner's offenses did not reference the firearm enhancement guideline, USSCG § 2D1.1(b)(1) (1988 ed.).[1] The court of appeals' opinion ignored petitioner's argument concerning the CCE provisions. In its Order denying panel rehearing, however, the court stated, with respect to this ignored ground, that:

---

1. Further, he argued that the enhancement would not have been proper with respect to either conspiracy count, as there was no applicable conspiracy guideline for completed conspiracies at that time, and thus there was none that referenced the gun enhancement guideline.

> the district court's upward adjustment of the guideline sentencing range to reflect the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge. ... The appellant also argues ... that the upward adjustment [for possession of a firearm] was erroneous because the Sentencing Guidelines in effect at the time he was sentenced contained a lacuna making the gun possession enhancement inapplicable to a CCE charge under 21 U.S.C. § 848. On a proper record, this artfully spun asseveration might have some merit (or, at least, call for some detailed analysis). The appellant, however, failed to make the argument at the time of sentencing or to object to the presentence report on this basis. As we have stated on numerous occasions in analogous circumstances, issues not seasonably presented in the district court will not be addressed on appeal.

Appx. A; 940 F.2d at 743-44.

On October 3, 1991, petitioner filed a motion asking the court of appeals to reconsider its denial of his petition for rehearing, on the basis that its finding

rehearing, on the basis that its finding of waiver was without basis in the record because the district court did not impose the gun enhancement in connection with the CCE count, nor had the probation office or the United States Attorney's office ever argued that it should. The motion to reconsider also argued that the court of appeals had no power to affirm the two-level enhancement on a basis not relied on by the court below, and that, even if the issue should have been raised by counsel at sentencing, the appellate court should reach the issue because there was no legal authority for the adjustment. The motion to reconsider was denied by the court of appeals, by order entered October 17, 1991.

The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18

by Notice of Appeal filed after the announcement but before the entry of the judgment of sentence. Fed.R.App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

b. Statement of Facts

Petitioner organized and ran a cocaine distribution business based in Boston, Massachusetts, from approximately August 1986, until April 28, 1988. Between those dates, ten to fifteen transactions occurred between petitioner and his Colombian source, Jaime Toro Aristizibal, involving between seven to ten kilograms each. One "Yossi" Zalmanovich would arrange, from an apartment in Miami, Florida, for the purchase of

Miami, Florida, for the purchase of cocaine from Jaime Toro Aristizibal, and have it delivered to petitioner in Boston by courier. Petitioner's courier was Eli Filin, to whom petitioner was introduced by one Reuven Furer.

On June 25, 1987, Filin stole a ten-kilogram shipment of cocaine. Eventually petitioner became suspicious and arranged for Filin to deliver another shipment of cocaine to Boston. When he arrived, petitioner and coconspirator "Nuni" Mizrahi took him to an apartment where two others were waiting. Filin was tied to a chair, beaten, and threatened unless he told where the stolen shipment was. A gun, that Nuni produced, was held to Filin's head. On July 31, 1987, Filin confessed and returned the cocaine.

From July, 1987, to February, 1988, petitioner purchased cocaine from a

different source in New York and refused to buy it from Jaime again. Between February, 1988 and April 28, 1988, petitioner attempted to find a source for larger quantities of cocaine, which culminated in his arrest.

REASONS FOR GRANTING THE WRIT

1. This case presents a question expressly left open in Garrett v. United States, 471 U.S. 773 (1985): whether the Double Jeopardy Clause permits cumulative convictions and sentencing where a defendant's CCE does not continue in time beyond the date of indictment of the predicate offenses; this case also calls for reassessment of Garrett in light of subsequent changes in the federal drug and sentencing laws.

Petitioner was charged with 14 substantive cocaine possession and distribution offenses under 21 U.S.C. § 841(a)(1), and in the same indictment with a continuing criminal enterprise (CCE), 21 U.S.C. § 848, ending on the

same date as the latest distribution offense alleged, April 28, 1988. Petitioner was tried for all of the offenses in a single trial and was sentenced separately for his conviction on the CCE and on each other count. The court of appeals rejected petitioner's argument that his convictions and cumulative sentences on the substantive offenses that formed the predicates of the CCE offense violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Appx. A; 940 F.2d at 738-39, relying upon this Court's decision in Garrett v. United States, 471 U.S. 773 (1985). For the reasons that follow, this Court should grant certiorari to review this conclusion. The Court should clarify that Garrett does not apply under

the facts of petitioner's case, or must be modified in light of subsequent Congressional enactments stiffening the penalties for those convicted under the CCE statute.

In Garrett, this Court was faced with the question whether prosecution and punishment for engaging in a CCE violated the defendant's rights under the Double Jeopardy Clause not to be prosecuted or punished twice for the "same offense," where the defendant had been convicted in an earlier trial and punished for one of the predicate offenses, an importation of marijuana, used to establish the CCE. This Court held that Congress intended, in drafting the CCE statute as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, to create a "separate criminal offense which was

punishable in addition to, and not as a substitute for, the predicate offenses." Id. at 780. After determining that Congress intended to create a separate offense of CCE, this Court proceeded to the "critical inquiry [of] whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause." Id. at 787.

"[U]nder the facts of [that] case," id. at 794, this Court held that the earlier marijuana smuggling offense was not the "same offense" as the CCE for Double Jeopardy purposes, despite the Court's "assum[ption], for purposes of decision" that the marijuana offense "was a lesser included offense" of the CCE. Id. at 791. The critical fact of Garrett, to which the Court explicitly

and carefully limited its decision, was that "the continuing criminal enterprise charged against [the defendant] in Florida had not been completed at the time that he was indicted in Washington [for marijuana importation]." Id. at 792. It was "this evidence" of continuing criminal conduct subsequent to the first indictment which this Court stated "not only permits but requires the conclusion that the CCE charged in Florida ... was under Diaz [v. United States, 223 U.S. 442 (1912),] a different offense from that charged in the Washington indictment[,]" 471 U.S. at 793, and therefore could be separately prosecuted without running afoul of the Constitution.

In a concurring opinion, Justice O'Connor clarified the question left open in Garrett:

> Moreover, I note that we do not decide in this case whether a defendant would have a valid double jeopardy claim if the government failed in a later prosecution to allege and to present evidence of a continuing violation of § 848 after an earlier conviction for a predicate offense. Certainly the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution.

Id. at 800.

As to whether multiple punishment for the CCE and underlying marijuana offense violated the double jeopardy proscription, this Court noted that the sole question was what "the legislature intended." Id. at 794. The Court acknowledged that Congress was "silen[t] on this specific issue." Id. Nevertheless, this Court reasoned that because Congress intended to create and succeeded in creating the separate offenses of the ongoing CCE and the earlier-completed

predicate offense, a presumption that Congress intended separate punishment arises, subject to rebuttal. The Court stated:

> The presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences ... and we can assume it was aware that [creating separate offenses] would authorize cumulative punishments absent some indication of contrary intent.

Id. at 794. The Court found no such contrary indication in the CCE's language or history. Additionally, this Court found that "disallowing cumulative sentences would have the anomalous effect in many cases of converting the large fines provided by § 848 into ceilings[,]" sometimes smaller than the maximum for the predicate drug offenses, so that the government would be forced to choose whether to "elect[] a lower maximum fine in such a situation in order to attempt

to obtain the life imprisonment penalty available under the CCE provision." Id. at 795.

Thus, contrary to the implication of the court below, this Court in Garrett was not presented with, nor did it decide, the question at issue in petitioner David's case: whether multiple punishment for a CCE and coterminous predicate offenses indicted and tried with that CCE violates the Double Jeopardy Clause's proscription against multiple punishment for the same offense. Yet this Court's decision in Garrett that the CCE and underlying drug offense were not "the same" for double jeopardy purposes hinged on the fact -- not present in petitioner's case -- that the defendant's unlawful conduct continued beyond the date of indictment of the

predicate offense. As this Court stated: "One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." Id. at 791. Under the facts of petitioner's case, the CCE is therefore the "same offense" for multiple punishment purposes as the predicate drug offenses charged and tried with it.[2]

In a line of multiple-punishment cases previous to, but not undermined by, Garrett, this Court has established that, contrary to the situation involving distinct offenses, "where the offenses are the same ..., cumulative sentences are not permitted unless elsewhere

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2. In none of the post-Garrett cases in the other circuits cited by the government or the court below is it apparent that the predicate offenses ended at the same time as the CCE.

specially authorized by Congress." Whalen v. United States, 445 U.S. 684, 693 (1980) (applying Blockburger v. United States, 284 U.S. 299 (1932)). In Missouri v. Hunter, 459 U.S. 359 (1983), this Court explained Whalen:

> The rule of statutory construction [of Blockburger] noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the ... legislature has made its intent crystal clear [by specifically authorizing cumulative punishment]. Legislatures, not courts, prescribe the scope of punishments.

459 U.S. at 368. Thus, the presumption which applies with respect to offenses that are "the same" -- that Congress did not intend cumulative punishment -- is the opposite of that which governs with distinct offenses, as was applied in

Garrett. Where "the matter [of Congressional intent] is not entirely free of doubt, the doubt must be resolved in favor of lenity." Whalen, supra, 459 U.S. at 694. See also United States v. Pungitore, 910 F.2d 1084, 1116-17 (3d Cir. 1990) (applying similar analysis and permitting cumulative sentencing for RICO conspiracy and substantive offenses on ground that statutes define separate offenses and Congress has not indicated contrary intent), cert. denied, 111 S.Ct. 2010, 114 L.Ed.2d 98 (1991).

Whether Congress intended to permit cumulative sentencing for continuing criminal enterprises and underlying coterminous drug offenses used as the predicate acts required for the CCE is hardly "crystal clear," or even clear at all. First and most important, this

Court recognized the lack of express legislative guidance on this question in Garrett, supra, 471 U.S. at 794-95.

Second, the legislative history of the 1970 Act is replete with references to the fact that the CCE concept was being advanced in order to create an extremely severe penalty. See H.R.Rep. No. 91-1444, pt. 1, reprinted in 1970 U.S.Code Cong. & Admin. News 4570, 4576, 4652. CCE was established to punish the "professional criminal" as distinguished from "the youthful offender who is himself enmeshed in the drug abuse trap." 116 Cong.Rec. 33659 (Sept. 24, 1970) (remarks of Rep. Minish). Congress' goal in establishing the CCE concept was clearly to penalize continuing drug offenders severely, but if Congress had intended to allow sentencing for the

underlying offenses in addition to the CCE penalty, it would have so provided. Congress did not "specially authorize" cumulative punishment, nor does the legislative history demonstrate that Congress intended it. The presumption that Congress did not intend cumulative punishment has not been rebutted.

In addition to relying on a presumption that Congress intended to permit cumulative sentencing for the CCE and its predicate offenses, this Court in Garrett doubted that Congress would have intended the "anomalous effect" that the maximum allowable fine under the CCE statute could, in the circumstances involving the most serious predicate drug offenses, be lower than the maximum provided under the predicate offense statutes. Id. at 795. Garrett, however, predated the effective

date of the Sentencing Reform Act of 1984 (SRA), Pub.L. No. 98-473, §§ 211-239, 98 Stat. 1987, as well as the Anti-Drug Abuse Acts of 1986 and 1988 (ADAA's). If the fine structure provided in the 1970 version of the CCE statute seemed to require the conclusion that Congress intended to allow cumulative fines, to be added to those from predicate offenses, the enhanced penalties of these later enactments no longer warrant that result.

First, in the legislative history to the SRA, Congress made clear that it did not favor multiple sentencing for lesser and greater included offenses, S.Rep. No. 225, 98th Cong., 2d Sess. 125-28, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3310, so long as the sentence imposed "assure[d] an appropriate sentence for all the criminal

conduct of the defendant." Id. at 128. But more significantly, the 1986 and 1988 ADAAs made the penalties for CCE progressively, even drastically, more serious.

The first version of the CCE statute, which was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as analyzed in Garrett, provided, for a first CCE conviction, a mandatory minimum term of imprisonment of 10 years, with a maximum of life, all without parole, and a maximum fine of $100,000. For a second CCE conviction the prison term was 20 years to life and a maximum fine of $200,000. A year after Garrett was decided, Congress eliminated the possibility of the anomaly referred to in that decision in the ADAA of 1986, by raising the first-CCE maximum fine to $2,000,000, and the repeat offender fine

to $4,000,000, with an even higher maximum authorized by reference to any fine specified in Title 18. See 18 U.S.C. § 3571(d).[3] And in the 1988 ADAA, Congress further stiffened the penalties, increasing the mandatory minimum prison term from 10 to 20 years, and from 20 to 30 years for repeat offenders. A death penalty was provided as well, for certain circumstances. Thus, the penalty structure now cannot possibly support "pyramiding of penalties" from the predicate drug offenses under § 841 on any of the bases suggested in Garrett.

Due to these changes in the federal drug and sentencing laws, it is time for this Court to reassess Garrett to the

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3. This section permits a maximum fine of "twice the gross [pecuniary] gain" derived by the defendant. In 1986, this provision was found at 18 U.S.C. § 3623(c)(1).

extent it allows cumulative punishment for a CCE and substantive predicate offenses, even those which were indicted and tried before the defendant stopped the unlawful conduct that led to the CCE indictment.[4] If, however, this Court chooses not to revisit Garrett under those factual circumstances, it should at least find that case inapplicable to petitioner's case, and grant certiorari to review and reverse the court of appeals' affirmance of petitioner's cumulative sentences for CCE and coterminous substantive predicate offenses tried together.

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4. Petitioner does not question the holding of Garrett insofar as it determined that a CCE and its predicate offenses may be charged in a single indictment and jointly tried, as occurred here.

2. In upholding a sentencing guideline enhancement on a factual basis not relied upon by the prosecutor or the district court, the court of appeals so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

At sentencing, the district court applied the two-level upward adjustment for possession of a firearm "during commission of the offense," as provided under § 2D1.1(b)(1) of the U.S. Sentencing Commission Guidelines.[5] The upward adjustment resulted in raising petitioner's base offense level under the Sentencing Guidelines from 36 to 38, and his total offense level from 38 to 40.

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5. Guideline § 2D1.1 of that version of the Guidelines set base offense levels for drug trafficking offenses. Subsection (b)(1) of that Guideline provided:

> (b) Specific Offense Characteristic
>
> (1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

Combined with petitioner's Criminal History Category Score of I (no prior convictions), his Guideline sentencing range, as determined by the district court, was 292 to 365 months, whereas if he had not received the adjustment, his range would have been 235 to 293 months, a difference of approximately six to almost ten years' imprisonment.

Although the district court did not specify which one or more of the 22 counts of the superseding indictment on which petitioner was convicted constituted "the offense" with respect to which it was applying the gun enhancement, the court did make clear the particular incident to which it was referring. The court stated:

> A gun was used on more than one occasion. But there is one in particular that I'm thinking about, when it went to the head of Mr. Filin. There is no question

> in my mind that the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that Mr. David was responsible for its use.

Sent.Tr. at 34-35.[6] The incident during which a gun allegedly "went to the head of Mr. Filin," as the court put it, occurred on or about June 30, 1987, before the November, 1987, effective date of the Sentencing Reform Act and Guidelines.

The shipment of cocaine concerning which the gun was used was the subject of count 12 of the superseding indictment, which charged petitioner David with one substantive act of possession and distribution, on June 24, 1987, and July 31,

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6. The Court did not amplify on this point in its Report of Statement of Reasons for the sentence, stating, in relevant part, only that: "(a) the gun was used (b) it furthered the commission of the offense and (c) David is responsible for it." Stmnt. of Reas., at 1.

1987. Because this count charged conduct occurring prior to the November 1, 1987, effective date of the Sentencing Guidelines, it could not result in a sentence under the guidelines. Sentencing Act of 1987, Pub.L. 100-182, § 2(a), 101 Stat. 1266; see generally Miller v. Florida, 482 U.S. 423 (1987). Thus, in and of itself, Count 12 could not carry an "enhancement" for possession of a firearm.

Nor did the district court give any indication that it was treating the gun incident as "Relevant Conduct," pursuant to USSCG § 1B1.3, with respect to any count to be sentenced under the guidelines. If it had been inclined to do so, the court would first have had to make antecedent factual findings under § 1B1.3(a)(1) through (5) to determine

whether the gun incident in fact qualified under the Guidelines for treatment as "relevant conduct" in sentencing for any other count.[7] The court's statements

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7. USSCG § 1B1.3(a) provides, in pertinent part:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, ... (ii) specific offense characteristics ... shall be determined on the basis of the following:
>
> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, ... or that otherwise were in furtherance of that offense;
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts [which includes all drug distribution offenses], all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm or risk of harm that resulted form the acts or omissions specified ..., if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk

at sentencing and in its Statement of Reasons show that the court did not consider these factors or rely on the "relevant conduct" Guideline in applying the firearm adjustment.

Even if the district court's reasoning on this point is not entirely clear, see Appx. A; 940 F.2d at 740 (noting that the district court's manner of arriving at the guideline sentencing range was "less than pellucidly clear"), the court of appeals, in its initial panel decision, recognized that the district court had applied the gun

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that was the object of such acts or omissions;

(4) the defendant's state of mind, intent, motive and purpose in committing the offense; and

(5) any other information specified in the applicable guideline.

enhancement specifically with respect to the Count 12 distribution, and upheld the lower court's ruling. Noting that "David's challenge to [the judge's factual] findings is reviewable only for clear error," id. at 742, and thus recognizing that the application of a "specific offense characteristic" to enhance a sentence involves a factfinding function, the court of appeals stated:

> It was perfectly reasonable for the sentencing judge to conclude that, in brandishing a firearm (or causing one to be brandished) while trying to retrieve a stolen consignment of cocaine, David was furthering the substantive offense related to that shipment.

Appx. A; 940 F.2d at 742. The only "substantive offense related to that shipment" was the summer 1987 distribution charged in count 12 of the superseding indictment. In its panel opinion, the court of appeals neither stated nor

suggested that the district court had imposed the gun enhancement with reference to the CCE or any other "substantive offense" in the superseding indictment than Count 12, which it in fact had not.[8]

In denying panel rehearing, the court of appeals apparently recognized its error in upholding an enhancement in connection with a pre-guidelines offense, and changed its rationale, for the first time stating that the district court's upward adjustment of the guideline range "reflect[ed] the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge." Appx. A; 940 F.2d at 743 (Order denying panel rehearing). The Court

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8. As to the conspiracy counts, see note 12 below.

further held that petitioner had waived any objection regarding the propriety of the enhancement with respect to the CCE. Id. at 744.

The court of appeals was wrong in upholding the firearm enhancement on this basis, because its asserted substitute reason is invalid.[9] The court below was also wrong in holding that petitioner's

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9. The district court could not properly have applied the firearm enhancement on the basis of the CCE conviction, because the version of the Sentencing Guidelines in effect at the time petitioner committed his post-guidelines offenses did not provide for the gun enhancement with respect to CCE. Application Note 3 to Guideline § 2D1.1 stated, in pertinent part, that "The enhancement also applies to offenses that reference § 2D1.1, i.e., §§ 2D1.2-2D1.4." The CCE Guideline, however, was (and is) § 2D1.5, which contained no reference to § 2D1.1. (The Sentencing Commission amended the CCE guideline on November 1, 1989, after petitioner's sentencing, so that it now references § 2D1.1.) Therefore, the enhancement could not have properly been applied with reference to petitioner's CCE conviction.

objection was waived.[10] However, petitioner understands that this Court does not sit to review and correct routine errors, no matter how clear (and prejudicial), in the application of the guidelines, and therefore does not press this error as a reason supporting this Court's

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10. Neither the probation office in the PSI, nor the government (not even in its brief in the court of appeals), nor the sentencing judge in explaining the court's reasoning for applying the enhancement, ever referred to the CCE or, indeed, to any of the other substantive charges in the indictment as justifying the firearm enhancement. In the sentencing proceedings, the prosecutor argued that the gun was possessed in connection with the Count One conspiracy (petitioner's conviction for which the court of appeals properly vacated, along with the other conspiracy conviction, charged in Count Two of the superseding indictment) and -- identifying it by relevant facts rather than by numbered count of the indictment -- the Count 12 distribution. Sent.Tr. at 31-32. Surely, a defendant has no obligation to object in the district court to something that has not happened; objection is only required in order to preserve for appellate review issues that have arisen.

grant of a writ of certiorari.[11] Instead, the related question petitioner presents here concerns the propriety of the action taken by the court of appeals in connection with petitioner's request for rehearing on the sentencing enhancement issue, which raises a fundamental and potentially recurring question of appellate authority in the exercise of the courts of appeals' new sentence review power under 18 U.S.C. § 3742.

Fundamentally, the court of appeals lacked authority, under 18 U.S.C. § 3742(e), to uphold an enhancement on a fact-bound basis not relied upon by the lower court. As stated above, the

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11. By the same token, petitioner adheres to the positions set forth in the preceding two footnotes, and suggests a summary grant of certiorari and remand to the court of appeals on these issues, if no greater relief is to be granted.

district court gave no indication that it applied the enhancement with reference to the CCE count, or any substantive count of the indictment other than count 12, nor did the government at any time urge it to do so except with regard to the conspiracy convictions.[12]

The court of appeals expressly recognized in the panel opinion that it was limited in reviewing any facts underlying the enhancement to a search for "clear error." Appx. A; 940 F.2d at 742. See also United States v. Paulk, 917 F.2d 879, 884 (5th Cir. 1990) (reviewing district court's factual determinations concerning whether firearm

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12. The district court did not apply the enhancement with regard to the conspiracy convictions in any event, and the court of appeals properly ruled that those convictions evaporated upon their merger with the CCE count. See Jeffers v. United States, 432 U.S. 137 (1977).

enhancement of § 2D1.1(b)(1) applied as "relevant conduct" under § 1B1.3, under clearly erroneous standard); United States v. Vazzano, 906 F.2d 879, 883 (2d Cir. 1990) (adopting view of three other circuits, holding that whether conduct is relevant to offense of conviction is subject to "clearly erroneous" standard of review). See 18 U.S.C. § 3742(e).

Yet, in asserting on rehearing that the district court's application of the enhancement "reflected" the gun's use "in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge," where the district court had referred only to the singular "offense," Sent.Tr. at 35; Statement of Reasons at 1, no. 3(b)(4), identifying facts pertinent only to the count 12 pre-

guidelines distribution, and made no "relevant conduct" findings, the court of appeals not only greatly exceeded this scope of review, but entirely pretermitted the fact-finding function.

It is the role of the district court, not the court of appeals, to act as the finder of fact at sentencing. See McMillan v. Pennsylvania, 477 U.S. 79 (1986); cf. McCormick v. United States, 500 U.S. --, 114 L.Ed.2d 307, 324 & n.8 (1991); Chiarella v. United States, 445 U.S. 222, 235-36 (1980); Dunn v. United States, 442 U.S. 100, 106 (1979) (all holding that appellate court may not affirm on fact-bound theory not presented to factfinder below). See also Braxton v. United States, 500 U.S. --, 114 L.Ed.2d 385, 393 (1991) (contrasting standards of review for findings of fact

and for legal conclusions underlying guideline sentence).

If the court of appeals determined, on consideration of petitioner's motion for rehearing, that the district court may have applied the enhancement based on its being "relevant" under USSCG § 1B1.3 to the CCE or any substantive offense, the court was required to vacate petitioner's sentences and remand to allow the district court to make the necessary factual determinations which would then permit meaningful and legally permissible appellate review.

For this reason, this Court should grant the writ of certiorari and issue an authoritative ruling that sentences under the Guidelines may not be affirmed on factual bases not argued before and decided by the sentencing court.

3. Whether the exception in the wiretap statute permitting after-the-fact minimization of foreign language conversations where an expert is "not reasonably available" during interception can be satisfied where the government assumes that it must import a foreign police officer, without making any effort to obtain an expert in the United States, presents an important question of federal law calling for resolution by this Court.

Pursuant to court authorization, DEA agents in this case monitored the petitioner's Hebrew-language conversations in their entirety, regardless of content, for 17 days, with no contemporaneous minimization. After that time, Israeli National Police officers flown in from Israel began to act as interpreters and monitor the wiretap. The government had made no efforts to obtain an interpreter in the United States, which would have resulted in less delay, if any at all.

In denying the motion to suppress the wiretapped conversations and any

evidence derived therefrom on the basis of improper minimization, the district court held (without elaboration) that the government satisfied its burden under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, to show that a suitable expert in Hebrew was not "reasonably available," 18 U.S.C. § 2518(5), at the time of the wiretapping itself.[13] Appx. C. The court of appeals affirmed. Appx. A; 940 F.2d at 730.

The lower courts implicitly accepted the government's representation that two factors made it reasonable to import police officers from Israel to act as interpreters, rather than even to seek anyone in the United States: (1) that an expert was needed in "common, everyday

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13. The pertinent minimization language of 18 U.S.C § 2518(5) is quoted in full in the Statutes Involved, above.

Hebrew" rather than "biblical Hebrew," and (2) that the government was unaware of the scope of the criminal drug enterprise being investigated, so that security reasons rendered it necessary to use a police officer from another country rather than any United States resident.

The Assistant United States Attorney engaged in the following colloquies with the court at the hearing on the motion to suppress:

> THE COURT: Was it necessary to try to obtain people from Israel in order to act as interpreters?
>
> AUSA: ... there is a difference between biblical Hebrew and common-speech Hebrew. We were not aware at the beginning of the investigation the extent of the conspiracy. And therefore, there was a need to get interpreters from outside of this area who could speak common, everyday Hebrew. A number of alternatives were considered and explored. And it turned out that that was simply the most expedient way to get interpeters [sic] who were secure in that respect for an electronic surveillance.

* * * *

THE COURT: Does the Government ever get in touch with people like Senora Batto who's in charge of interpretation, our own official interpreter?

AUSA: Absolutely, your Honor. But I think in a case where we are dealing with an an [sic] allegation, serious allegations of enormous amounts of cocaine being brought up to the Boston area of Brookline, with a possibility that there are other cities involved, there are numerous people within Boston involved, the security concerns are extremely high, and the concern for not compromising --

THE COURT: Do you worry about security?

AUSA: I think you always worry about security in a wire trap [sic] investigation.

THE COURT: You would sooner trust somebody that comes from a foreign country than people who are authorized by this Court to interpret?

AUSA: Certainly -- Well, I don't want to get into loyalties, but I think that certainly an officer, that is a police official of another country, is somebody who, like a police official of our own, is somebody we give credence to.

Supp. Hrng. Tr. at 55, 100. These rationales do not satisfy a test of reasonableness, either legal or factual.

Whether the government has satisfied the minimization requirements of § 2518(5) "depend[s] on the facts and circumstances of each case." Scott v. United States, 436 U.S. 128, 140 (1978). Those requirements of course include the prerequisite for after-the-fact minimization that no expert be "reasonably available" for contemporaneous minimization. The government failed to meet that burden in this case.

The record, as well as common sense, reveals that the government's first asserted reason for seeking an Israeli police officer as an interpreter, that it needed an individual who spoke "common, everyday" rather than "biblical" Hebrew,

was disingenuous at best. Certainly the government knew that many such persons were present in such a large city as Boston, which has an extensive population of Israeli immigrants as well as numerous Hebrew linguists at that city's many outstanding academic institutions (and competent non-academic interpreters as well), the great majority of whom are not biblical scholars. It would not take an overabundance of creativity to determine how to find entirely trustworthy speakers of common Hebrew in these cities, which the government must have recognized.

It is clear from the prosecutor's statements at the suppression hearing that the government's second stated reason was, in actuality, its whole reason for failing to seek an interpreter locally or from somewhere within the

United States: a belief that anyone (apparently other than a police officer) in the entire United States who might be able to speak ordinary Hebrew constituted a security risk, due to a likelihood of having loyalties divided between the United States and his or her fellow speakers of Hebrew (even if the latter were drug dealers).

This conclusion was flatly unreasonable and based on an unspoken and fundamentally unacceptable assumption about the "loyalties" of foreign-language-speaking (or perhaps only Hebrew-speaking) Americans. It is inconsistent with the use of trusted interpreters in the grand jury setting under Fed.R. Crim.P. 6(d). The Constitution will not tolerate adverse governmental action premised on mere fear that an ethnic

group's internal solidarity could pose risks of disloyalty to Nation and duty. Compare Korematsu v. United States, 323 U.S. 214 (1944), with Batson v. Kentucky, 476 U.S. 79 (1986). Construction of Title III demands no less.

Had the government attempted to obtain an interpreter from the Boston area or even from this country, it would not have taken 17 days for the government to succeed. It certainly would not have been, nor did petitioner claim that it had to be, "utter[ly] impossible," the standard the court of appeals rejected. Appx. A; 940 F.2d at 730. What it would have been was a reasonable effort, as required by the statute. Compare United States v. Cale, 508 F.Supp. 1038, 1041 (S.D.N.Y. 1981) (government satisfied § 2518(5) where government used agents and

translators fluent in Croatian "almost from the start").

Because the government failed to meet its burden to establish that foreign language experts were not "reasonably available," the district court and court of appeals were wrong in upholding the government's after-the-fact minimization, and the conversations tapped should have been suppressed under 18 U.S.C. § 2515.[14]

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14. The government argued below, as an alternative basis for upholding the district court's denial of the motion to suppress, that the government agents did not listen to the tapes until the interpreters were present, who then minimized the conversations as if intercepted contemporaneously. Yet neither § 2515 (Title III's exclusionary rule; see Statutes Involved), § 2518(5), nor any other pertinent provision contains a prejudice requirement excusing violations of the plain language of the statute. See United States v. Ojeda Rios, 495 U.S. --, 109 L.Ed.2d 224 (1990). Nor could the violation of § 2518(5) constitute harmless error under Fed.R.Crim.P. 52(a). As the government implicitly conceded in the court of appeals, Gov't Br. at 98, the wiretaps produced direct and devastating evidence on much of the CCE, substantive counts 15 and 16, and all of

For this reason as well, the writ should be granted.

CONCLUSION

For each of the foregoing reasons, petitioner Shmuel David prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming his convictions and sentences on all but the conspiracy counts of the superseding indictment in this case.

Respectfully submitted,

PETER GOLDBERGER
PAMELA A. WILK
Attorneys for Petitioner

February 24, 1992.

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the telephone counts (counts 20, 21, 23, 24 and 27). The wiretap evidence certainly could have affected the verdicts.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1807

UNITED STATES OF AMERICA,
Appellee

v.

SHMUEL DAVID,
Defendant, Appellant

No. 89-1808

UNITED STATES OF AMERICA,
Appellee

v.

JAIME TORO ARISTIZIBAL,
Defendant, Appellant

No. 89-1809

UNITED STATES OF AMERICA,
Appellee

v.

AMPARO TORO ARISTIZIBAL,
Defendant, Appellant

No. 89-2110

UNITED STATES OF AMERICA,
Appellee

v.

YEHUDA YARDEN,
Defendant, Appellant

[published at 940 F.2d 722]

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. Dist. Judge]

Before
Campbell, Selya and Cyr, Circuit Judges.

Wendy Sibbison, with whom Barry P. Wilson and Zalkind, Sheketoff, Wilson, Homan, Rodriguez & Lunt were on brief for appellant Shmuel David.

Dana A. Curhan for appellant Jaime Toro Aristizibal. Raymond E. Gillespie for appellant Amparo Toro Aristizibal. Stephen R. Kaplan for appellant Yehuda Yarden.

Frank J. Marine, Attorney, United States Department of Justice, with whom Wayne A. Budd, United States Attorney, and Jonathan Chiel and Stephen P.

Assistant United States Attorneys, were on brief for the United States.

[Heard April 4, 1991. Decided] July 29, 1991. [Rehearing and Rehearing En Banc Denied Aug. 28, 1991. Motion for Rehearing Denied Sept. 27, 1991.]

SELYA, Circuit Judge. These appeals arise out of the ashes of the long, hard-fought criminal trial of six defendants, Eliahu Abramson, Efraim Natanel, Shmuel David, Yehuda Yarden, Jaime Toro Aristizibal, and Amparo Toro Aristizibal. Abramson was acquitted. Natanel, whose appeal has already been decided, United States v. Natanel, [938] F.2d [302] (1st Cir. 1991), was convicted on only one count. The remaining four defendants were convicted on multiple counts. After sifting through the copious record in light of their myriad claims of error, we affirm most of what transpired, but vacate two of David's convictions.

affirm most of what transpired, but vacate two of David's convictions.

I. BACKGROUND

This case involves a spider web of drug dealing, with David at the web's center. The web was spun over a period of close to two years, engulfing an array of persons and places. A useful way to introduce the various characters and to gain some perspective on this arachnoid adventure is to summarize the superseding indictment.

The indictment named fourteen defendants in twenty-seven counts. Count 1 alleged that David, Yarden, the Toros, Joseph Zalmanovich, and Mordechai Mizrahi engaged in a conspiracy to distribute cocaine, 21 U.S.C. § 846, from not later than August 1986 until about March 1988.[1]

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1. The Toros are husband and wife. Zalmanovich, familiarly known as "Yossi," was apparently a fugitive at the time of trial. Mizrahi, familiarly known as

Count 2 alleged that twelve defendants, save only the Toros, conspired to possess and distribute cocaine in March and April 1988. The count 1 conspiracy allegedly took place in Massachusetts, Florida, and Belgium; the count 2 conspiracy allegedly took place in the same three venues, plus Ohio and Colombia. Most of the remaining counts represented either substantive charges of possession with intent to distribute, 21 U.S.C. § 841(a)(1), or charges of facilitating drug transactions by using the telephone, in violation of 21 U.S.C. § 843(b). These counts are summarized in the appendix. The linchpin of the indictment was count 17, wherein David was charged with engaging in a continuing criminal enterprise (CCE), 21 U.S.C. § 848, from on or before August 1986 through April 28, 1988.

enterprise (CCE), 21 U.S.C. § 848, from on or before August 1986 through April 28, 1988.

Trial began on March 27, 1989. Verdicts were returned against the appellants on May 31, 1989. David was convicted on twenty-two counts. Jaime Toro was convicted on the count 1 conspiracy and on twelve substantive counts of possession with intent to distribute. His wife, Amparo, was convicted on the count 1 conspiracy. Yarden was convicted of participating in both conspiracies and on a telephone count. After sentencing, these appeals ensued.[2]

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2. David was sentenced to thirty-year terms of imprisonment on the CCE and on all but one of the possession counts; twenty years on the two conspiracy counts; and shorter jail terms on the remaining charges. The sentences all ran concurrently. Jaime Toro received concurrent sentences of seventeen and a half years on the conspiracy count and on all but one possession count (for which

We eschew an exegetic opening statement, preferring instead to discuss the facts, insofar as necessary to place the issues into workable perspective, in the course of the commentary that follows. We mix and match the asseverations advanced by the several appellants in an effort to sustain a natural progression.

II. SUPPRESSION ISSUES

David argues that the district court erred in denying his motions to suppress evidence obtained from a court-authorized digital display beeper (a so-called beeper clone) and certain court-approved telephone intercepts.[3] We deal with these issues seriatim.

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terms, and special assessments were also imposed.

3. On appeal, Yarden adopts David's suppression arguments. We take no view of Yarden's standing to raise these points since our resolution of the merits makes the matter of standing academic.

telephone intercepts.[3] We deal with these issues seriatim.

A. The Beeper Clone.

David was the proprietor of a beeper corresponding to telephone number (617) 466-0366. On December 4, 1987, the government received authorization from the United States District Court for the District of Massachusetts to intercept communications targeted for this beeper. The authorization was thereafter renewed on several occasions. Judge Woodlock, who allowed the intercept, found probable cause to believe both that David was using the beeper to further criminal activity and that communications sent to the beeper, if made known, would reveal

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3. On appeal, Yarden adopts David's suppression arguments. We take no view of Yarden's standing to raise these points since our resolution of the merits makes the matter of standing academic.

cept and display telephone numbers transmitted to the authentic beeper. Federal agents utilized the beeper clone to obtain information leading to evidence against David and others. After indictment, David moved to suppress the investigatory fruits derived from the beeper clone. The trial judge held a hearing, reserved decision, and later denied the motion without stated reasons.

The interception of electronic communications as an investigative technique is governed by Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2521 (Title III). The statutory scheme provides a mechanism through which the government may seek judicial authorization to surveil electronic communications. Section 2518 of Title III sets out what must be included in an authorization

The statutory scheme provides a mechanism through which the government may seek judicial authorization to surveil electronic communications. Section 2518 of Title III sets out what must be included in an authorization application. One requirement is "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). We have explained that "[t]he basis for the statutory monition is the salutary notion that the sovereign should make a reasonable, good faith effort to run the gamut of normal investigative procedures before resorting to means so intrusive as electronic interception of telephone calls." United

the beeper clone. We are not convinced.

In these purlieus, appellate review is limited to the question of whether "the issuing court could reasonably have concluded that normal investigatory procedures reasonably appeared to be unlikely to succeed." United States v. Ashley, 876 F.2d 1069, 1074 (1st Cir. 1989); see also United States v. Scibelli, 549 F.2d 222, 226 (1st Cir.) (appellate court need only "decide if the facts set forth in the application were minimally adequate to support the determination that was made"), cert. denied, 431 U.S. 960[, 97 S.Ct. 2687, 53 L.Ed.2d 278] (1977). This inquiry is not rigid or rule-oriented; to the precise contrary, "Title III demands a practical, commonsense approach to exploration of investigatory avenues and relative intrusiveness." United States v. Uribe,

determination that was made"), cert. denied, 431 U.S. 960[, 97 S.Ct. 2687, 53 L.Ed.2d 278] (1977). This inquiry is not rigid or rule-oriented; to the precise contrary, "Title III demands a practical, commonsense approach to exploration of investigatory avenues and relative intrusiveness." United States v. Uribe, 890 F.2d 554, 556 (1st Cir. 1989). Because drug trafficking is inherently difficult to detect and presents formidable problems in pinning down the participants and defining their roles, investigative personnel must be accorded some latitude in choosing their approaches. In short, Title III "was not meant to force the government to run outlandish risks or to exhaust every conceivable alternative" before applying for intercept authorizations. Hoffman, 832 F.2d

why he thought the investigation, absent injection of a beeper clone, had dried up. Doherty described the government's pains-taking use of public documents and tele-phone toll records to obtain information about David and other suspects. He then recounted knowledge gleaned through three confidential informants. The first (CI-1) informed the agent that he often called David's beeper as a prelude to purchasing cocaine. He also stated, based on personal observations of Yossi inspecting and paying for cocaine in Florida, that David was purchasing seven to ten kilograms of cocaine monthly for distribution in Boston. The second informant told the agent that he had bought cocaine from one Jacky Amouyal in front of a restaurant which Amouyal said David owned in part, and that Amouyal referred to a man who was in the restaurant

cocaine. He also stated, based on personal observations of Yossi inspecting and paying for cocaine in Florida, that David was purchasing seven to ten kilograms of cocaine monthly for distribution in Boston. The second informant told the agent that he had bought cocaine from one Jacky Amouyal in front of a restaurant which Amouyal said David owned in part, and that Amouyal referred to a man who was in the restaurant at the time as "Shmuel" (David's first name). The third informant said that he bought cocaine from David on several occasions, contacting him through his beeper. In addition, some two weeks before the affidavit was signed, the agent reported that CI-1 called David's beeper in the agent's presence. David returned the call a few minutes later. A conversation

unable to identify current customers of David's drug operation, furnish a complete list of David's suppliers, or pinpoint the locations used to store, process, and distribute the cocaine. An undercover agent, he said, would not be able to root out more than a single member of the ring and would be of no help in identifying customers. Reviewing David's telephone toll records (which had been subpoenaed) would not do the trick, as those records would only chronicle long-distance calls and, in any event, would be stale. Doherty considered, and rejected as inefficacious, the use of a pen register, inasmuch as no particular telephone could yet be singled out, to the exclusion of other telephones, as being used by David. Finally, the agent stated his belief that not enough information had been gathered to support the

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In these circumstances, it is plain that the district court could appropriately have found the beeper clone to be warranted. The government showed that it had invested considerable time and energy in conventional investigative methods.

three weeks and that this interval was too short a time for the government to have adequately explored less intrusive avenues. Yet, although the length of time an investigation has run is an important factor to consider in weighing the reasonableness of a Title III request, we refuse to place talismanic significance on time alone. High-stakes drug trafficking is by its nature volatile, fast-paced, elusive, and in constant motion. The reaction time of those who seek to expose narcotics rings must be gauged in that light. We cannot subscribe, therefore, to a bright-line rule that says an investigation must be ongoing for more than three weeks before an intercept can be authorized. Rather, the nisi prius court, as it did here, must review the totality of the application to determine if the government made a reasonable,

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applied for, and received, permission to tap David's telephone. In obtaining the order, the government relied, inter alia, on information obtained through the beeper clone. Once again, David challenges the authorization on the ground that necessity was not shown. We need not dally. During the roughly two months that had elapsed from the beeper authorization to the wiretap application, the DEA endeavored to discover the identities of David's principal cohorts in numerous ways. Four informants were questioned, the beeper clone was put in service, a pen register was tried, an unsuccessful attempt to introduce an undercover agent transpired, and physical surveillance was essayed. None of these techniques revealed the type of information that the DEA needed to crack the drug ring--information which was likely

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and, despite the exercise of reasonable diligence, a translator is not available for on-the- spot minimization, a different rule obtains. In such circumstances, "minimization may be accomplished as soon as practicable after ... interception." Id. David's appeal requires that we probe the interstices of these rules.

The facts are straightforward. The DEA secured the original wiretap authorization on February 17, 1988. According to Doherty's affidavit, the agents were then in the process of locating interpreters capable of understanding modern Hebrew as it pertained to drug dealings. Through law enforcement agencies in Israel, the government was able to borrow Israeli police officers for this purpose. The Israeli officers arrived in Boston on March 1. Following some briefing, they were deployed

foreign language or code and, despite the exercise of reasonable diligence, a translator is not available for on-the-spot minimization, a different rule obtains. In such circumstances, "minimization may be accomplished as soon as practicable after ... interception." Id. David's appeal requires that we probe the interstices of these rules.

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guidepost was not skirted. The key to after-the-fact minimization is that the process utilized must protect the suspect's privacy interests to approximately the same extent as would contemporaneous minimization, properly conducted. Accord United States v. Gambino, 734 F.Supp. 1084, 1106 (S.D.N.Y. 1990). This criterion was fulfilled. The DEA's protocol was designed to replicate what would happen in a contemporaneous minimization: the interpreters were told to stop listening to a tape once they determined that the conversation was beyond the scope of the investigation. By translating only the portions of the tapes that seemed relevant, the government's actions comported with the expectations of Congress, see, e.g., S. Rep. No. 541, 99th Cong., 2d Sess. 1, 30, reprinted in 1986 U.S. Code Cong. & Admin. News 3555, 3584,

United States, 436 U.S. 128, 139-42[, 98 S.Ct. 1717, 1724-26, 56 L.Ed.2d 168] (1978); Uribe, 890 F.2d at 557. But, that guidepost was not skirted. The key to after-the-fact minimization is that the process utilized must protect the suspect's privacy interests to approximately the same extent as would contemporaneous minimization, properly conducted. Accord United States v. Gambino, 734 F.Supp. 1084, 1106 (S.D.N.Y. 1990). This criterion was fulfilled. The DEA's protocol was designed to replicate what would happen in a contemporaneous minimization: the interpreters were told to stop listening to a tape once they determined that the conversation was beyond the scope of the investigation. By translating only the portions of the tapes that seemed relevant, the govern-

credibility determinations in line with the jury's verdict. See United States v. Ingraham, 832 F.2d 229, 230 (1st Cir.1987), cert. denied, 486 U.S. 1009[, 108 S.Ct. 1738, 100 L.Ed.2d 202] (1988); United States v. Cintolo, 818 F.2d 980, 983 (1st Cir.), cert. denied, 484 U.S. 913[, 108 S.Ct. 259, 98 L.Ed.2d 216] (1987). The verdict must be affirmed so long as any rational trier of the facts could have found the essential elements of the crime beyond a reasonable doubt. See, e.g., United States v. Gomez-Pabon, 911 F.2d 847, 852 (1st Cir. 1990), cert. denied, 111 S.Ct. 801[, 112 L.Ed.2d 862] (1991).

Applying this standard in the current context necessitates that we keep several principles in mind. In determining whether David organized, supervised or managed a criminal enterprise and its associates, we

The applicable standard of review is a familiar one. An appellate court, faced with a sufficiency challenge, must take the evidence in the light most hospitable to the prosecution, drawing all plausible inferences in its favor and resolving all credibility determinations in line with the jury's verdict. See United States v. Ingraham, 832 F.2d 229, 230 (1st Cir.1987), cert. denied, 486 U.S. 1009[, 108 S.Ct. 1738, 100 L.Ed.2d 202] (1988); United States v. Cintolo, 818 F.2d 980, 983 (1st Cir.), cert. denied, 484 U.S. 913[, 108 S.Ct. 259, 98 L.Ed.2d 216] (1987). The verdict must be affirmed so long as any rational trier of the facts could have found the essential elements of the crime beyond a reasonable doubt. See, e.g., United States v. Gomez-Pabon, 911 F.2d 847, 852 (1st Cir.

F.2d 719, 731 (8th Cir. 1986), or that the degree of supervision exercised over each person was comparable, see United States v. Jones, 801 F.2d 304, 308 (8th Cir. 1986). As long as a reasonable juror could have concluded beyond a reasonable doubt, in line with these tenets, that the defendant organized, supervised, or managed five different people in furtherance of his narcotics-related activities, the verdict must stand.

In this case, our review is tightly cabined. While David advances various arguments, factual and legal, as to why particular people could not be considered to be under his organizational spell, he neither challenges the jury instructions that were given with respect to this element of the offense nor contends that other (necessary) instructions were

identities of the henchmen, but must only agree that there were at least five. See United States v. Tarvers, 833 F.2d 1068, 1075 (1st Cir. 1987). There is, moreover, no requirement that the five individuals be shown to have acted in concert or contemporaneously, see United States v. Aiello, 864 F.2d 257, 264 (2d Cir. 1988); United States v. Lueth, 807 F.2d 719, 731 (8th Cir. 1986), or that the degree of supervision exercised over each person was comparable, see United States v. Jones, 801 F.2d 304, 308 (8th Cir. 1986). As long as a reasonable juror could have concluded beyond a reasonable doubt, in line with these tenets, that the defendant organized, supervised, or managed five different people in furtherance of his narcotics-related activities, the verdict must stand.

thereafter ran, a drug trafficking operation in the Boston area from 1986 through 1988. For most of that time, he was distributing from seven to ten kilograms of cocaine per month. His aides included Yossi (who was based in Florida, had a hand in acquiring the cocaine, and arranged to ship it north) and Nuni (who was David's right hand man in Boston). David concedes that his relationship with both Yossi and Nuni constituted supervision for the purposes of section 848. He likewise concedes that he oversaw at least one other person, as a courier, from time to time.[6]

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6. The record reveals that, over time, David used at least three couriers--a nameless "guy with the El Camino," Eli Filin, and Richard Parrish. David contends that his supervision of three couriers in succession amounted to the supervision of one person, since the three filled a single role in the enterprise. While his position is not without some theoretical support, see, e.g., United States v. Bond, 847 F.2d 1233, 1237 (7th Cir. 1988), the question is complicated by David's failure to request a jury instruction on this point. We

We recount the facts in greater detail than we otherwise might only because knowledge of them is useful to an understanding of issues subsequently discussed. The evidence showed that David assembled, and thereafter ran, a drug trafficking operation in the Boston area from 1986 through 1988. For most of that time, he was distributing from seven to ten kilograms of cocaine per month. His aides included Yossi (who was based in Florida, had a hand in acquiring the cocaine, and arranged to ship it north) and Nuni (who was David's right hand man in Boston). David concedes that his relationship with both Yossi and Nuni constituted supervision for the purposes

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could not be counted, and the court had erroneously refused the instruction, then the defendant might be successful in challenging the verdict on appeal.

guity was for the jury to resolve. The CCE statute can be satisfied by evidence that the defendant organized five or more people in the criminal endeavor without any proof that the defendant exercised knee-jerk control over those whom he organized, or that they were his puppets. See Apodaca, 843 F.2d at 426.

Adding Furer to the roster still leaves one slot to be filled. Summarizing a vignette from the record illustrates that the jury could lawfully have chosen from a surfeit of eligible candidates to fill this vacancy. In June 1987, David's courier, Filin, tried to steal a shipment of cocaine. He and an accomplice faked a robbery at the point of delivery. David became suspicious. He and Yossi (the shipment's intended recipient) flew to Florida, met with Furer, and arranged for

his Florida suppliers (the Toros). Furer arranged a dozen or more shipments, kept the cocaine at his place of business in Florida until it could be delivered, paid the Toros with funds furnished by David, and attended meetings on David's behalf. Although David argues vigorously that Furer's status was more akin to that of an independent contractor, we think any ambiguity was for the jury to resolve. The CCE statute can be satisfied by evidence that the defendant organized five or more people in the criminal endeavor without any proof that the defendant exercised knee-jerk control over those whom he organized, or that they were his puppets. See Apodaca, 843 F.2d at 426.

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did not confess, he was taken to a hotel room where Dede was waiting. Dede suggested that both Filin and Yossi be required to take lie detector tests. Filin was released. A short time later, Furer asked him to make another delivery to Boston. Upon his arrival, a lie detector test was administered. Filin failed the test, confessed to the robbery, and agreed to return the cocaine.

It is clear from this tawdry tale that, at the very least, the jury was entitled to find that Dede, Moshe One, and Moshe Two, in addition to Yossi, Nuni, Furer, and a courier, were within David's sphere of influence and subject to his supervision in the course of his drug trafficking activities. Wholly apart from evidence implicating other persons, this proof was enough to scuttle the assignment of error.

responsible.

Soon thereafter, Filin was given another batch of cocaine and told to bring it to Boston. When Filin arrived at the designated address, David and Nuni escorted him to another apartment where Moshe One and Moshe Two were waiting. Filin was tied to a chair, beaten, and threatened with his life unless he told the truth about the purloined narcotics. A gun (furnished by Nuni) was held to Filin's head. When Filin did not confess, he was taken to a hotel room where Dede was waiting. Dede suggested that both Filin and Yossi be required to take lie detector tests. Filin was released. A short time later, Furer asked him to make another delivery to Boston. Upon his arrival, a lie detector test was administered. Filin failed the

In this instance, the court's jury instructions were adequate, providing a satisfactory framework within which the jury could find that Yarden was a part of (1) no conspiracy, (2) either or both of the charged conspiracies, or (3) a single conspiracy encompassing both charged conspiracies. The jury having determined that there were two distinct conspiracies as charged and that Yarden was a member of each of them, his assignment of error boils down to whether there was sufficient evidence to sustain these findings.

A. Number of Conspiracies.

We first summarize the evidence from which we believe the jury could reasonably have concluded that there were two different conspiracies as set out in counts 1 and 2. Our review is to be conducted in the light most favorable to the government,

body of evidence is indicative of a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a matter of fact. See United States v. Boylan, 898 F.2d 230, 243 (1st Cir.), cert. denied, 111 S.Ct. 139[, 112 L.Ed.2d 106] (1990). In a jury trial, given proper instructions (or in lieu thereof, unchallenged instructions), the jury's determination as to whether one or more conspiracies existed is subject to review only for evidentiary sufficiency. Id.; accord United States v. Khoury, 901 F.2d 948, 956 (11th Cir. 1990).

In this instance, the court's jury instructions were adequate, providing a satisfactory framework within which the jury could find that Yarden was a part of (1) no conspiracy, (2) either or both of the charged conspiracies, or (3) a single

an unrelated crime, agreed to become a government informant. He made various telephone calls trying to persuade David to resume purchasing cocaine from the Toros.

In February 1988, Furer was successful; David wanted to start buying larger quantities of cocaine and felt that the New York prices were exorbitant. A meeting was held at Furer's office. David, Nuni, Furer, and the Toros attended. David announced a desire to acquire a minimum of one hundred kilograms of cocaine per month. The Toros agreed to inform their sources. Later that day, Furer told David that Jaime Toro was working on setting up a meeting, and asked David if he wanted ten or fifteen kilograms to tide him over until a larger-scale transaction could be arranged. A few days passed. Then, on February 23, 1988, Amparo Toro told David that the Toros'

March 1988, whereas the second conspiracy began in March 1988 and ended the following month. The evidence showed that, during late 1986 and early 1987, David's ring was buying cocaine in Florida from the Toros (usually receiving about ten kilograms at a crack) and selling it in the Boston area. This was the norm until the summer of 1987 (when Filin stole a shipment). Thereafter, David, having soured on his Florida connections, began exploring the New York market for cocaine. It was approximately at this time that Furer, who had been convicted of an unrelated crime, agreed to become a government informant. He made various telephone calls trying to persuade David to resume purchasing cocaine from the Toros.

In February 1988, Furer was successful; David wanted to start buying

out. He indicated frustration with the high price of doing business through Furer and the Toros. Yarden then proposed that a new arrangement be fashioned: either he would start supplying David with cocaine or David would begin to supply him with cocaine in Europe. The discussion ended without a definitive agreement. Several days later, David told Parrish that he was fed up with his Florida associates and was looking elsewhere for cocaine. On March 8, Yossi told David that he had lined up a meeting in Colombia to discuss direct purchases of cocaine. His spirits buoyed, David flew to Colombia shortly thereafter.

On March 24, David informed Yarden that he had negotiated a supply of cocaine at not much more than half the Toros' price. David started gathering cash. By March 28, he thought he had accumulated

getting involved in some drug deals. Yarden recruited Parrish to act as a courier to transport the cocaine from Florida to Boston. Parrish and David spoke and agreed on Parrish's fee. Parrish was told to stand by until the ten/fifteen kilogram consignment was ready. On February 26, Jaime Toro brought a single kilogram to Furer's office. David was inaccessible, however, and no transaction occurred. (As matters turned out, David and Yossi had retrieved their money from Furer's office and gone back to Boston that same day.)

On February 29, David told Yarden that the Florida supply source had not panned out. He indicated frustration with the high price of doing business through Furer and the Toros. Yarden then proposed that a new arrangement be fash-

participants, including the defendant, collogue to accomplish an unlawful objective, taking at least one overt step in furtherance of that objective. See, e.g., United States v. Latham, 874 F.2d 852, 863 (1st Cir. 1989). In analyzing the evidence in a multiple conspiracy case, then, we can start by asking a basic question: Is the proof sufficient to permit a jury to find, beyond a reasonable doubt, the separate agreements charged in the indictment? See United States v. Glenn, 828 F.2d 855, 858 (1st Cir. 1987). The answer to this question may rest wholly on circumstantial evidence. Indeed, "the government can prove the existence of both express and tacit agreements by pointing to the actions as well as the words of the defendants." Id.

There is no mechanical test through which a reviewing court can plumb the scope

would furnish one of his Boston customers with three kilograms of cocaine. David agreed and a price was set.

On April 24, David called Nuni from Florida and told him that forty kilograms was en route. He asked Nuni to bring more money to him in Florida. The shipment arrived, but was thirty kilograms lighter than expected. Parrish drove the contraband to Boston where David met him. On April 28, a courier from Ohio - a new market for David - arrived in Boston to pick up five kilograms for $30,000. Later that day, Nuni and David were arrested.

When all is said and done, a conspiracy is merely an agreement, express or implied, under the terms of which the participants, including the defendant, collogue to accomplish an

the similarities (or differences) in the evidence used to prove the two conspiracies. Cf., e.g., Gomez-Pabon, 911 F.2d at 860 (outlining test to be used in assessing whether two charged conspiracies constitute a single offense for double jeopardy purposes).

On the present facts, it is readily apparent that reasonable jurors could have reached divergent conclusions in terms of the number of conspiracies which were afoot. It can plausibly be argued, as Yarden exhorts, that the events of March and April 1988 represented no more than a change in direction of the ongoing conspiracy. By the same token, however, it can be argued with at least equal cogency that the original conspiracy had ended and a new one had emerged. David's dissatisfaction was evident during and after his

scope and contours of a given conspiracy or determine how many conspiracies may be said to exist. Rather, we must make a case-specific assay, concentrating on the totality of the evidence and the permissible inferences therefrom. See United States v. Drougas, 748 F.2d 8, 17 (1st Cir.1984). Nevertheless, where, as here, it is clear that at least one conspiracy could be found, a possible method of organizing the evidence to determine whether more than one conspiracy was proven is to examine the relationship of the charged (multiple) conspiracies to one another in terms of factors such as the times when the relevant activities transpired; the locations at which the activities occurred; the identities of the persons involved; the coconspirators' ends; the means used to achieve those

of the two conspiracies was the same--although the second was designed to be on a grander scale. Yet, such factors are suggestive rather than dispositive; there is no rule of law that requires the architecture, the goals, or the staffing of successive conspiracies to be wholly different, one from the other. Moreover, there were important differences in the two operations - to name a few, the setting of a more ambitious sales quota; the shift to Colombia as the primary source of supply; the elimination of the Toros and Furer from the team; and the targeting and penetration of new market areas.

We need not paint the lily. In the final analysis, we think that the facts, viewed favorably to the government, supported a rational conclusion that the arrangement to import cocaine directly from

after his February trip to Florida. His relationship with the Toros had deteriorated markedly. He was frustrated by the ongoing conspiracy's inability to structure and support the larger operation that he envisioned. The cast of characters changed in that time frame; only four of the six count 1 coconspirators (including David and Yarden) were named in count 2, and there was evidence that up to eight persons who had not been accused of membership in the earlier conspiracy had participated in the later one. Given these circumstances, the jury could logically have believed that, after discussions with Yarden and Parrish, David decided to dismantle the preexisting apparatus, strike off in a different direction, and start a new operation.

1029[, 106 S.Ct. 1233, 89 L.Ed.2d 342] (1986).

B. Yarden's Involvement.

We turn now to the related question of whether there was sufficient evidence to tie Yarden to both conspiracies. To prove such a charge, the government must show that a conspiracy existed, that the defendant knew of it, and that he voluntarily participated in it. See Gomez-Pabon, 911 F.2d at 852; United States v. Aponte-Suarez, 905 F.2d 483, 489 (1st Cir.), cert. denied, 111 S.Ct. 531[, 112 L.Ed.2d 541] (1990), 111 S.Ct. 975[, 112 L.Ed.2d 1061] (1991). The defendant must have intended to agree with his coconspirators and to commit the substantive offense. See United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir.), cert. denied, 492 U.S. 910[, 109 S.Ct. 3227, 106 L.Ed.2d 576], 110

viewed favorably to the government, supported a rational conclusion that the arrangement to import cocaine directly from Colombia marked the inception of a conspiracy distinct from the original conspiracy, not a mere adjustment in the framework of the latter. Compare, e.g., United States v. Hart, [933] F.2d [80], [86] (1st Cir. 1991) (affirming finding of separate drug trafficking conspiracies despite proximity in time, partial overlap in locale, similarity in nature of unlawful conduct, and identity of objectives) with, e.g., Gomez-Pabon, 911 F.2d at 861 (where second venture is merely an adaptation of conspiratorial plan of thwarted first venture, two conspiracies cannot be made out). A criminal jury, after all, "is free to choose among varying interpretations of

Cir. 1988); United States v. Marolla, 766 F.2d 457, 461 (11th Cir. 1985); United States v. Guerro, 693 F.2d 10, 13 (1st Cir. 1982); United States v. Waldron, 590 F.2d 33, 34 (1st Cir.), cert. denied, 441 U.S. 934[, 99 S.Ct. 2056, 60 L.Ed.2d 662] (1979); see also United States v. Nuccio, 373 F.2d 168, 174 n. 4 (2d Cir.) ("no proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws"), cert. denied, 387 U.S. 906[, 87 S.Ct. 1688, 18 L.Ed.2d 623] (1967).

Moreover, the evidence that Yarden enlisted in the count 1 conspiracy by no later than February 1988 was solid. On this record, nothing further was required. When, as here, a miscreant opts to join an ongoing conspiracy, the law holds him accountable for the earlier acts of his

coconspirators and to commit the substantive offense. See United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir.), cert. denied, 492 U.S. 910[, 109 S.Ct. 3227, 106 L.Ed.2d 576], 110 S.Ct. 105[, 107 L.Ed.2d 68] (1989). The proof of a defendant's conspiratorial involvement may consist of indirect evidence, including inferences drawn from acts performed in furtherance of the conspiracy. Gomez-Pabon, 911 F.2d at 853; Glenn, 828 F.2d at 858.

On the count 1 conspiracy, we think the jury could have found that Yarden agreed to help David transport the cocaine that the Toros were supposed to produce in late February. To implement this agreement, Yarden recruited Parrish and introduced him to David. That most of the cocaine never materialized, and

some of the Colombian cocaine for one of his own customers. It borders on the frivolous to raise questions of evidentiary sufficiency anent his participation in the count 2 conspiracy.

V. THE COUNT 21 CONVICTION

We will not tarry over Yarden's challenge to his conviction on count 21. At trial, some of the evidence against Yarden consisted of his role in Hebrew-language telephone conversations intercepted by the government. Yarden's conviction for the unlawful use of a telephone was based on these conversations. On appeal, he argues that the conviction cannot stand because he never physically possessed any cocaine. The argument is a non-sequitur.

Yarden was indicted and convicted on count 21 for unlawful use of a telephone in facilitation of a conspiracy to possess

later than February 1988 was solid. On this record, nothing further was required. When, as here, a miscreant opts to join an ongoing conspiracy, the law holds him accountable for the earlier acts of his coconspirators in furtherance of the conspiracy. See, e.g., Cintolo, 818 F.2d at 997 ("one who joins an ongoing conspiracy is deemed to have adopted the prior acts and declarations of coconspirators, made after the formation and in furtherance of the conspiracy"); United States v. Baines, 812 F.2d 41, 42 (1st Cir. 1987) ("[A] conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight - or conduct - regardless of whether he is aware of just what it is composed."); see

A. Evidence of Violence.

All the appellants challenge the admission of evidence concerning threats and violence perpetrated by David, Dede, Moshe One, and Moshe Two in the aftermath of Filin's theft of the cocaine shipment. They also protest the admission into evidence of a recorded conversation in which David informed Furer, arguably in an attempt to intimidate him, that Musa, a New York drug dealer, had been murdered. Because the evidence actually involved David, and not the other appellants, our analysis must proceed in two stages. We turn first to the arguments advanced by the Toros and Yarden, all of whom tell us that the district court erred in overruling their objections and in allowing the evidence.

tions. On appeal, he argues that the conviction cannot stand because he never physically possessed any cocaine. The argument is a non-sequitur.

Yarden was indicted and convicted on count 21 for unlawful use of a telephone in facilitation of a conspiracy to possess cocaine, in violation of 21 U.S.C. § 843(b). Thus, actual possession was not required. In a section 843(b) "telephone" case involving a narcotics conspiracy, the prosecution only has to show that the conspiracy existed and that the accused made interstate calls to advance its ends. See United States v. Thomas, 586 F.2d 123, 130-31 (9th Cir. 1978); see also United States v. Cordero, 668 F.2d 32, 43 (1st Cir. 1981) (telephone calls facilitating development of a drug conspiracy violate § 843(b)). Such

404(b) is mislaid. The evidence concerned the acts of a codefendant - not conduct attributable to any of them. Objections based on Rule 404(b) may be raised only by the person whose "other crimes, wrongs, or acts" are attempted to be revealed. See, e.g., United States v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir.) ("Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant."), cert. denied, 484 U.S. 989[, 108 S.Ct. 510, 98 L.Ed.2d 508] (1987). Because the evidence in question was evidence of David's behavior, the Toros and Yarden lack standing to invoke the rule.[8]

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8. In passing, we acknowledge that, theoretically, acts could, under certain circumstances, be considered the acts of a non-actor through attribution, inasmuch as certain acts of a conspirator may be attributed to his coconspirators. See, e.g., United States v. Crocker, 788 F.2d 802, 806 (1st Cir.1986); United States v. Cranston, 686 F.2d 56, 62 (1st Cir.1982). In this case, however, neither Yarden nor the Toros argue that any such direct attribution was in prospect. At any

murdered. Because the evidence actually involved David, and not the other appellants, our analysis must proceed in two stages. We turn first to the arguments advanced by the Toros and Yarden, all of whom tell us that the district court erred in overruling their objections and in allowing the evidence.

1. **Admissibility as to Non-Participants.** In essence, the Toros and Yarden claim that, as to them, the evidence in question was unduly prejudicial and admitted in contravention of Fed. R. Evid. 404(b) and 403.[7] Their

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7. The rules provide:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed.R.Evid. 404(b).

unacceptably great. We need not speculate, however, for this is not such an extreme case. The Filin incident, albeit fearsome, was not overblown. As to the other episode, David never said that he killed Musa or arranged for his execution. In fine, neither body of evidence was so shocking, relative to the other evidence adduced at trial, as to make it probable that the limiting instructions would fall on deaf ears or that the jury's perception of the other defendants would be unfairly tainted by their association with David. And we take the jury's acquittal of two defendants, Natanel and Abramson, on the conspiracy charges, as an ex post validation of the trial judge's faith in the effectiveness of his limiting instructions. Accord, e.g., Natanel, 938 F.2d at 308 (listing other cases).

evidence in question was evidence of David's behavior, the Toros and Yarden lack standing to invoke the rule.[8]

Refined to bare essence, then, the trio's argument comes down to a claim that the evidence likely spilled over and prejudiced their defenses. We do not think this claim has any merit. The trial judge carefully instructed the jury to consider the evidence only as against David. This was the proper course to

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reference of the others' arguments does not adequately develop or preserve the issue with respect to his own appeal. See, e.g., Zannino, 895 F.2d at 17 (it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

In any event, we do not doubt that the evidence was properly admitted against David. For one thing, Rule 404(b) does not apply at all. The challenged evidence was independently admissible as proof that David ran a CCE. Rule 404(b) only applies to "[e]vidence of other crimes, wrongs, or acts." Fed.R.Evid. 404(b) (emphasis supplied). Evidence which is part and parcel of the crime being tried is simply not "other crimes" evidence within the ambit of Rule 404(b). See, e.g., United

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2. Admissibility as to David. Although David is postured somewhat differently with respect to this evidence, he has not argued the idiosyncracies [sic] of his own position. Rather, he has adopted verbatim the other appellants' arguments. See Fed. R. App. P. 28(i). Adoption by reference, however, cannot occur in a vacuum; to be

unfair effect." Freeman v. Package Machinery Co., 865 F.2d 1331, 1340 (1st Cir. 1988). This is not the rare or extra-ordinary case. The lower court acted well within the realm of its discretion in admitting the challenged evidence.

B. Evidence Anent "The Mexican."

In November 1987, while the count 1 conspiracy was still in progress, Furer (who had by then agreed to cooperate with the government) attempted to arrange a transaction between David and an undercover DEA agent known by the sobriquet "the Mexican." David, exercising great caution, refused to swallow the baited hook. He suggested that Furer have Jaime Toro do a deal with the Mexican to "see if everything go[es] well." Furer then introduced Toro to the agent, who said that he wanted to buy ten kilograms of cocaine. Toro showed

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of several controverted issues, including Toro's intent to continue dealing with David's organization, the opportunity on his part for continuing involvement with the count 1 conspiracy, and the working relationship among David, Furer, and Toro. See, e.g., Hadfield, 918 F.2d at 994; United States v. Crocker, 788 F.2d 802, 804 (1st Cir. 1986); cf. United States v. Fields, 871 F.2d 188, 197-98 (1st Cir.) (discussing use of evidence of subsequent acts), cert. denied, 110 S.Ct. 369[, 107 L.Ed.2d 355] (1989). As for Rule 403, the district court's finding that the evidence's probative value overbalanced its potential for unfair prejudice was plainly supportable. See, e.g., Rodriguez-Estrada, 877 F.2d at 156 ("By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

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question could not "be considered ... in determining whether the accused did the act charged in the indictment.... [or] for any other purpose whatever, unless the jury first find [sic] that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment," was of this genre.

We do not think the instruction clearly states, or even closely approximates, the method of Rule 404(b). To be sure, the uses of Rule 404(b) evidence are circumscribed, but the evidence is not stripped of all vitality. The rule specifically permits extrinsic act evidence to be introduced to prove matters central to the offense charged, e.g., motive, opportunity, intent, and so forth. In this case, as we have already mentioned, the evidence

continue dealing with David's organization, the opportunity on his part for continuing involvement with the count 1 conspiracy, and the working relationship among David, Furer, and Toro. See, e.g., Hadfield, 918 F.2d at 994; United States v. Crocker, 788 F.2d 802, 804 (1st Cir. 1986); cf. United States v. Fields, 871 F.2d 188, 197-98 (1st Cir.) (discussing use of evidence of subsequent acts), cert. denied, 110 S.Ct. 369[, 107 L.Ed.2d 355] (1989). As for Rule 403, the district court's finding that the evidence's probative value overbalanced its potential for unfair prejudice was plainly supportable. See, e.g., Rodriguez-Estrada, 877 F.2d at 156 ("By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

counts, citing the Double Jeopardy Clause.[9] He theorizes that a person who is convicted and sentenced on a CCE charge under 21 U.S.C. § 848 cannot constitutionally be convicted and sentenced for predicate offenses, such as conspiracy, 21 U.S.C. § 846, or possession with intent to distribute, 21 U.S.C. § 841, perpetrated in the course of, and included within, the CCE.

We recently addressed these same double jeopardy concerns in United States v. Rivera-Martinez, 931 F.2d 148 (1st Cir. 1991). We ruled that, when a section 846 conspiracy count is used to establish the "continuing series of violations" and "in concert" aspects of a CCE, cumulative punishment on both the conspiracy and the

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9. The Double Jeopardy Clause mandates that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

which declared that the evidence in question could not "be considered ... in determining whether the accused did the act charged in the indictment.... [or] for any other purpose whatever, unless the jury first find [sic] that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment," was of this genre.

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on both a CCE and a count charging an underlying substantive act. See id.; accord United States v. Jones, 918 F.2d 909, 911 (11th Cir. 1990) (per curiam); United States v. Jefferson, 782 F.2d 697, 701 (7th Cir.1986).

We see no need to revisit this issue or to indulge in a rote repetition of the rationale supporting our conclusions.[10] It suffices to say that, for the reasons explained at some length in our earlier precedent, Rivera-Martinez, 931 F.2d at 151-54, the Double Jeopardy Clause requires

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10. In an effort to avoid the unwelcome force of precedent, David argues that, even though Congress initially intended that separate punishments be imposed, the federal sentencing guidelines, as they have evolved, presuppose a different result. This argument is plucked out of thin air, without any logical foundation or citation to persuasive authority. Nothing in the Sentencing Reform Act, or in the guidelines themselves, undercuts the rationale of Garrett and its progeny.

VII. DOUBLE JEOPARDY

David challenges his convictions on the conspiracy and substantive possession counts, citing the Double Jeopardy Clause.[9] He theorizes that a person who is convicted and sentenced on a CCE charge under 21 U.S.C. § 848 cannot constitutionally be convicted and sentenced for predicate offenses, such as conspiracy, 21 U.S.C. § 846, or possession with intent to distribute, 21 U.S.C. § 841, perpetrated in the course of, and included within, the CCE.

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cally rejecting a salmagundi of constitutional attacks on the sentencing guidelines. These issues have been convincingly dealt with before, see, e.g., Mistretta v. United States, 488 U.S. 361[, 109 S.Ct. 647, 102 L.Ed.2d 714] (1989); United States v. Bradley, 917 F.2d 601, 605 n. 3 (1st Cir. 1990); United States v. La Guardia, 902 F.2d 1010, 1014-17 (1st Cir. 1990); United States v. Seluk, 873 F.2d 15, 16-17 (1st Cir. 1989) (per curiam), and no useful purpose would be served by pushing them around yet another plate.

A. Applicability of the Guidelines.

The Toros challenge the lower court's decision to use the sentencing guidelines with regard to the convictions stemming from the count 1 conspiracy. It is well established that the guidelines apply to a defendant whose offense begins before the

any substantive predicate offenses. Id. at 153-54 (citing Garrett v. United States, 471 U.S. 773, 795[, 105 S.Ct. 2407, 2419, 85 L.Ed.2d 764] (1985)). Thus, the Double Jeopardy Clause does not prohibit conviction and sentence on both a CCE and a count charging an underlying substantive act. See id.; accord United States v. Jones, 918 F.2d 909, 911 (11th Cir. 1990) (per curiam); United States v. Jefferson, 782 F.2d 697, 701 (7th Cir.1986).

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133] (1989). Under this criterion, we have no hesitancy in concluding that the finding was amply bulwarked. Indeed, the record was replete with evidence that the count 1 conspiracy did not end until February 1988, at the earliest.

The Toros try to pull a rabbit out of this somewhat bedraggled hat. They say that, even if the conspiracy lasted into 1988, their involvement in it ended no later than the summer of 1987. But, there is no evidence that the Toros withdrew from the conspiracy at an earlier date. It is black letter law that cessation of activity, in and of itself, is not enough to constitute withdrawal from a conspiracy:

> In order to withdraw, a conspirator must act affirmatively either to defeat or disavow the purposes of the conspiracy.... Typically, there must be evidence either of a full confession to authorities or a communication by the accused to his co-conspirators

guidelines' applicability to the initial conspiracy. The trimmings consist of incremental arguments concocted by David and Yarden, respectively. Before beginning to work our way through the menu, however, we set the appetizer to one side, categori-cally rejecting a

of participation in a conspiracy which extends past the effective date of the guidelines, the guidelines take into account the entirety of the defendant's behavior in furtherance of the conspiracy. See, e.g., United States v. Arboleda, 929 F.2d 858, 870-71 (1st Cir. 1991); United States v. McKenzie, 922 F.2d 1323, 1328 & n. 2 (7th Cir. 1991) (collecting cases).

B. David's Remaining Points Anent Sentencing.

David challenges the district court's construction of his guideline sentencing range (GSR).[12] In approaching this aspect of the case, we confess to finding the record less than pellucidly

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12. David does not assign error to the sentences imposed on the "telephone" counts, 21 U.S.C. § 843, so we ignore those counts for purposes of this discussion.

before the guidelines' effective date and continues after the effective date. See, e.g., United States v. Fazio, 914 F.2d 950, 959 & n. 14 (7th Cir. 1990) (collecting cases). The appellants' asseveration depends, therefore, upon whether the conspiracy could be found to extend past November 1, 1987.

The district court concluded that the conspiracy was of sufficient duration. We remain mindful that the determination of factbound matters pertinent to sentencing need only be supported by a preponderance of the evidence and can be set aside only for clear error. See United States v. Ruiz, 905 F.2d 499, 507-08 (1st Cir. 1990); United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir.1989); United States v. Diaz-Villafane, 874 F.2d 43, 48 (1st

> critical datum in arriving at the GSR - is predicated in large part on the amount of drugs involved. The drug quantity is derived from all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction," whether or not charged in the indictment. U.S.S.G. § 1B1.3(a)(2). This means that "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or ... common scheme or plan as the count of conviction." Id., commentary (backg'd)....

Id. at 110; see also United States v. Blanco, 888 F.2d 907, 909-11 (1st Cir. 1989) (describing mechanical operation of "relevant conduct" model).

Here, the district court found that the relevant drug quantity was two hundred fifty kilograms. David does not dispute this assessment as a matter of fact. He does argue, however, that the drugs which he handled before November 1,

> purposes of the conspiracy.... Typically, there must be evidence either of a full confession to authorities or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals.

United States v. Juodakis, 834 F.2d 1099, 1102 (1st Cir. 1987) (per curiam) (citations omitted). Given this rigorous standard, the record before us simply does not permit a finding that the Toros withdrew from the venture. And the sock-dolager, of course, is the evidence that the Toros attempted to resume more active participation in the count 1 conspiracy by reestablishing their supply relationship with David in February 1988, well subsequent to the guidelines' inception date.

Equally unpersuasive is the appellants' contention that, for the purpose of factoring guideline calculations, only

some the punishment for a crime, after its commission." United States v. Giry, 818 F.2d 120, 135 (1st Cir.) (citations omitted), cert. denied, 484 U.S. 855[, 108 S.Ct. 162, 98 L.Ed.2d 116] (1987); see also Allen, 886 F.2d at 146. In David's case, the guidelines came into effect not after the criminal activity, but during it. Thus, the total amount of narcotics plied in the CCE's course could constitutionally be aggregated for sentencing purposes. See Cusack, 901 F.2d at 32 (RICO case); cf. Giry, 818 F.2d at 135 (amendment increasing penalty taking effect during commission of conspiracy does not violate Ex Post Facto Clause).

The next step toward setting the GSR required superimposing the guidelines' grouping provisions upon the relevant

this aspect of the case, we confess to finding the record less than pellucidly clear as to the exact manner in which the district court arrived at the GSR. Nevertheless, the gaps in the record do not relate to factual findings, such as would suggest a need to remand. Cf., e.g., United States v. McDowell, 918 F.2d 1004, 1011-12 (1st Cir. 1990). We can reconstruct the computation satisfactorily (excluding, of course, the conspiracy convictions, see supra Part VII).

Understanding the calculation of the GSR in this case requires an understanding of the term "relevant conduct" as it relates to modern-day sentencing in the federal courts. We explicated the latter concept, vis-a-vis drug offenses,

David's case that count 17 (the CCE charge, covered by § 2D1.5) was duly grouped with counts 3 through 16 (the substantive offenses, each of which was covered by § 2D1.1).

After counts have been appropriately grouped pursuant to section 3D1.2(d), "the offense level applicable to [the] Group is the offense level corresponding to the aggregated quantity [of drugs]." U.S.S.G. § 3D1.3(b). Moreover, "[w]hen the [grouped] counts involve varying offenses" of the same general type, to which different guidelines apply, the sentencing judge must "apply the offense guideline that produces the highest offense level." Id. Thus, to determine the base offense level for the Group comprising counts 3 through 17, the district court was obliged to survey the

hundred fifty kilograms. David does not dispute this assessment as a matter of fact. He does argue, however, that the drugs which he handled before November 1, 1987 should have been excluded because of ex post facto problems. The argument is puerile. The CCE ran well past the guidelines' trigger date, and the substantive counts underlying the CCE are thus brought squarely into the computation. See, e.g., United States v. Allen, 886 F.2d 143, 145-46 (8th Cir. 1989) (amounts of cocaine purveyed prior to guidelines' effective date were appropriately aggregated in setting base offense level when distribution was pursuant to a continuing course of conduct that extended past the effective date); see also Arboleda, 929 F.2d at 870-71; United States v. Cusack, 901 F.2d 29, 32 (4th

addition, the court added four levels pursuant to U.S.S.G. § 3B1.1 (authorizing upward adjustment for a defendant who plays an "aggravating role" as an organizer or leader of a criminal activity involving five or more participants).[13] A two-level downward adjustment was made for acceptance of responsibility. U.S.S.G. § 3E1.1(a). The adjusted offense level, then, was forty. The district court used this level to fix the GSR. It sentenced David within the confines of the range. See U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

David complains that, by operation of the grouping principles, the CCE

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13. David's contention that the record did not sustain an upward role-in-the-offense adjustment is effectively demolished by our earlier discussion of the evidence against him. See supra Part III. To say more would be an exercise in superfluity.

Clause).

The next step toward setting the GSR required superimposing the guidelines' grouping provisions upon the relevant conduct provisions. The guidelines provide in pertinent part that:

> When a defendant has been convicted of more than one count, the court shall:
>
> (a) Group the counts resulting in conviction into distinct Groups of Closely- Related Counts ("Groups") by applying the rules specified in [U.S.S.G.] § 3D1.2.
>
> (b) Determine the offense level applicable to each Group by applying the rules specified in [U.S.S.G.] § 3D1.3.

U.S.S.G. § 3D1.1(a). Where, as in this instance, differing counts involve "substantially the same harm," and the offense levels are determined "primarily on the basis of ... the quantity of a substance involved," grouping is appropriate. U.S.S.G. § 3D1.2(d). Inasmuch

grouping. For another thing, there is nothing particularly surprising, or unfair, about the result. The CCE base offense level, thirty-two, is clearly intended to be a minimum. It ensures that when a defendant is convicted only on a CCE charge, or on a combination of a CCE and substantive charges involving relatively small amounts of drugs, a substantial sentence will nonetheless ensue. When, as here, a defendant is convicted not only of operating a CCE, but also on substantive counts involving vast amounts of drugs, the constraint set by U.S.S.G. § 2D1.5 is slack, and the base offense level takes on the coloration of the provisions applicable to the substantive counts. Thus, the level of forty, being properly calculated on at least one substantive count, was appro-

offense level." Id. Thus, to determine the base offense level for the Group comprising counts 3 through 17, the district court was obliged to survey the offense levels applicable to each count and then assign the highest of those levels to the Group.

On the facts of this case, the substantive possession offenses all had the same base offense level, thirty-six, a level determined primarily by the aggregate quantity of drugs involved in David's course of conduct. See U.S.S.G. § 2D1.1 (Drug Quantity Table) (establishing base offense level at 36 where relevant conduct implicates "50 KG cocaine" or more). This was higher than the base offense level assigned to count 17, see U.S.S.G. § 2D1.5, and thus became the trial court's starting point. To the

(or causing one to be brandished) while trying to retrieve a stolen consignment of cocaine, David was furthering the substantive offense related to that shipment. See, e.g., McDowell, 918 F.2d at 1011 (§ 2D1.1(b) adjustment should be made if gun is present "unless it is clearly improbable that the weapon and the offense were connected"); Ruiz, 905 F.2d at 507 (summarizing cases from other circuits). The upward adjustment was appropriate.

C. Yarden's Remaining Points Anent Sentencing.

Yarden asserts that the district court improperly fixed his base offense level by attributing to him the ten kilogram shipment of cocaine which Parrish brought to Boston in April 1988. See supra p. 733. Yarden claims that he was unaware of the shipment and that its

confines of the range. See U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

David complains that, by operation of the grouping principles, the CCE offense takes on the higher offense level attendant to surrounding substantive offenses. Were the CCE offense level calculated separately in his case, the base level would be only thirty-two, and no upward adjustment for role in the offense would be feasible, see U.S.S.G. § 2D1.5, comment., n. 1. It follows that the offense level for the CCE, standing alone, would have been lower than for the grouped counts. On this basis, David somehow concludes that the court was powerless to apply a more onerous base offense level to the CCE through grouping.

The asseveration, although couched in the most perfervid rhetoric, strikes

conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable."). Whether or not Yarden actually knew that the ten kilograms were in transit, there is no doubt that, given the scope and contours of the planned conspiracy, the shipment was reasonably foreseeable.

Moreover, Yarden introduced Parrish to David as a possible courier and was clearly aware that David was awaiting cocaine from Colombia. The evidence in this case was adequate to support the court's explicit finding that, at a minimum, Yarden played some role in effectuating the shipment. This, we think, was enough, by itself, to bring the ten kilogram transaction into the sentencing calculation. Cf., e.g.,

substantive counts. Thus, the level of forty, being properly calculated on at least one substantive count, was appropriately assigned to the CCE as well.

David also contests the upward adjustment for possession of a firearm. The district court ordered the increase based on evidence that a gun was held to Filin's head in an attempt to get Filin to talk about the stolen drug shipment. See supra p. 732. The judge found specifically that the firearm was of assistance in commission of the drug offenses and that David was responsible for its use. David's challenge to these findings is reviewable only for clear error.

The evidence obviously supports the finding that David was responsible for the gun's use, whether or not he actually

convictions and sentences are affirmed. The convictions and sentences of appellants Jaime Toro Aristizibal, Amparo Toro Aristizibal and Yehuda Yarden are all affirmed.

APPENDIX

Summary of Specific-Transaction Counts in Superseding Indictment

Count No.	Approx. Offense Date[*]	Defendants Involved
3	August 1986	David, Yossi, J. Toro
4	Nov. 13, 1986	David, Yossi, J. Toro
5	Dec. 19, 1986	David, Yossi, J. Toro
6	Jan. 23, 1987	David, Yossi, J. Toro
7	March 2, 1987	David, Yossi, J. Toro
8	March/Apr. 1987	David, Yossi, J. Toro
9	April 24, 1987	David, Yossi, J. Toro
10	May 1, 1987	David, Yossi, J. Toro
11	June 12, 1987	David, Yossi, J. Toro
12	June/July 1987	David, Yossi, J. Toro, Nuni

Parrish brought to Boston in April 1988. See supra p. 733. Yarden claims that he was unaware of the shipment and that its attribution to him for purposes of sentencing on the count 2 conspiracy was error. But, the district court's answer to this fact-dominated question is reviewable only for clear error, see Bradley, 917 F.2d at 605; Diaz-Villafane, 874 F.2d at 48, and we discern none here.

For attribution to occur, there is no requirement that a defendant involved in a drug conspiracy must actually have known that a particular shipment was effectuated. As long as the shipment was a foreseeable fruit of the conspiracy and within its scope, the amount of drugs may be attributed to a coconspirator. See U.S.S.G. § 2D1.4, comment., n. 1 ("If the

NOTE: Counts 3-16 and count 18 charged possession with intent to distribute, see 21 U.S.C. § 841(a)(1); count 19 was dropped prior to verdict; counts 20-27 charged communications offenses, see 21 U.S.C. § 843(b).

On Motion for Rehearing.

Sept. 27, 1991.

Appellant has filed a petition for rehearing focused exclusively upon the district court's upward adjustment of the guideline sentencing range to reflect the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge. Appellant's petition challenges our affirmance of this aspect of his sentence on several grounds. To some extent, these arguments rehash points made to, and rejected by, the panel, see, e.g., Op. at 741, 742-43,

think, was enough, by itself, to bring the ten kilogram transaction into the sentencing calculation. Cf., e.g., United States v. Franco, 909 F.2d 1042, 1046 (7th Cir. 1990) (where defendant knew or could reasonably have foreseen sale by coconspirator, quantity sold properly used in computing defendant's sentence).

IX. CONCLUSION

We need go no further. To the extent that the appellants have preserved other issues for appeal, none warrant discussion. After close and careful perscrutation of the record in light of the applicable law, we are fully persuaded that the several appellants, caught in a web of their own manufacture, were fairly tried and, with one exception, justly convicted and sentenced.

F.2d 14, 21 (1st Cir. 1991) (refusing to consider defendant's conceptual challenge to abuse-of-trust enhancement under sentencing guidelines because point was not raised below); United States v. Fox, 889 F.2d 357, 359 (1st Cir. 1989) (similar).

The petition for panel rehearing is denied.

10	May 1, 1987	David, Yossi, J. Toro
11	June 12, 1987	David, Yossi, J. Toro
12	June/July 1987	David, Yossi, J. Toro, Nuni

[Count No. Approx. Offense Date[*] Defendants Involved]

13	July 1, 1987	David, Yossi, J. Toro, Nuni
14	July 15, 1987	David, Yossi, J. Toro, Nuni
15	April 26, 1988	David, Yossi, Nuni
16	Apr. 28, 1988	David, Nuni, Abramson, Anthony Ramirez, Wilfredo Martinez
18	May 1987	Natanel
19	March 10, 1988	David, Danny Yarden
20	March 25, 1988	David, Yossi, Shlomo Levy
21	March 24, 1988	David, Yehuda Yarden
22	March 26, 1988	Yossi, Natanel
23	March 27, 1988	David, Natanel
24	April 27, 1988	David, Ramirez
25	April 24, 1988	Nuni, Abramson

26 April 28, 1988 Nuni, Abramson

27 April 26, 1988 David, Yossi

[* Some names of months abbreviated where spelled out in original.]

NOTE: Counts 3-16 and count 18 charged possession with intent to distribute, see 21 U.S.C. § 841(a)(1); count 19 was dropped prior to verdict; counts 20-27 charged communications offenses, see 21 U.S.C. § 843(b).

On Motion for Rehearing.

Sept. 27, 1991.

Appellant has filed a petition for rehearing focused exclusively upon the district court's upward adjustment of the guideline sentencing range to reflect the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge. Appellant's petition challenges our affirmance of

this aspect of his sentence on several grounds. To some extent, these arguments rehash points made to, and rejected by, the panel, see, e.g., Op. at 741, 742-43, and do not call for any further comment. The appellant also argues, however, that the upward adjustment was erroneous because the Sentencing Guidelines in effect at the time he was sentenced contained a lacuna making the gun possession enhancement inapplicable to a CCE charge under 21 U.S.C. § 848. On a proper record, this artfully spun asseveration might have some merit (or, at least, call for some detailed analysis). The appellant, however, failed to make the argument at the time of sentencing or to object to the presentence report on this basis. As we have stated on numerous occasions in analogous circum-

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1807

UNITED STATES,
Appellee,

v.

SHMUEL DAVID,
Defendent, Appellent.

Before

Breyer, Chief Judge,
Campbell, Torruella, Selya, and Cyr,
Circuit Judges.

ORDER OF COURT

Entered: September 27, 1991

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in

of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Ms. Sibbison and Mr. Marine]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

SHMUEL DAVID a/k/a SHMULIK
a/k/a SAM;
JOSEPH ZALMONOVICH a/k/a YOSSI;
MORDECHAI MIZRAHI a/k/a NUNI;
JAIME TORO-ARISTIZIBAL;
AMPARRO TORO-ARISTIZABIL;
ANTHONY RAMIREZ; CRIMINAL NO.
ELIAHU ABRAMSON; 88-154-Mc
YEHUDA YARDEN;
EFRIAM NATANEL;
DANNY YARDEN;
JOSEPH AMSILI-COHEN;
HANAN AMSILI a/k/a GILO;
SHLOMO LEVY;
WILFREDO MARTINEZ,
Defendents.

MEMORANDUM AND ORDERS

MARCH 14, 1989

Mc NAUGHT, D. J.

Motions of several of the above defendents were heard by this Court on February 21, 22, and 23, 1989. After hearing and mature consideration of all

memoranda filed, the Court enters the following orders:

* * * *

DEFENDENT SHMUEL DAVED [sic]

#430 Motion to Suppress Contents of and Evidence Derived from Intercepted Electronic Communications Occuring over Digital Display Beeper Responding to Telephone No. (617) 466-0366.

This motion is denied.

#433 Motion to Suppress Contents of and Evidence Derived from Intercepted Wire Communications Occuring over the Telephone numbered (617) 739-6233.

This Motion is denied.

#431 Motion for a Franks Hearing or an In Camera Hearing

This Motion is denied.

* * * *

/s/ John J. Mc Naught
JOHN J. Mc NAUGHT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

No. 91-1380

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHMUEL DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether petitioner's concurrent sentences on a continuing criminal enterprise (CCE) count and 14 predicate substantive drug counts violate the Double Jeopardy Clause.

2. Whether the court of appeals erred in affirming an upward adjustment of petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) on grounds different from those the district court recited.

3. Whether the government carried its burden under 18 U.S.C. 2518(5) of showing that Hebrew interpreters were "not reasonably available" in order to justify after-the-fact minimization of telephone conversations in Hebrew intercepted pursuant to a wiretap order.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1380

SHMUEL DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A93) is reported at 940 F.2d 722.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1991. On September 27, 1991, the court of appeals denied a petition for rehearing. Pet. App. A93-A95. On December 17, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 24, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848; two counts of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; 14 counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and five counts of unlawful use of a telephone, in violation of 21 U.S.C. 843(b). He was sentenced to 30 years' imprisonment, to be followed by three years of special parole and five years of supervised release, and was fined $500,000. The court of appeals vacated petitioner's convictions and sentences on the two drug conspiracy counts but affirmed his convictions and sentences on the remaining counts. Pet. App. A1-A93.

1. The evidence at trial showed that petitioner organized and supervised a large-scale cocaine distribution enterprise centered in Boston, Massachusetts, between late 1986 and April 28, 1988. During that period, petitioner distributed from seven to ten kilograms of cocaine per month. From late 1986 through March 1988, petitioner obtained cocaine from suppliers in Florida. Reuven Furer acted as petitioner's middleman in Florida. Co-conspirators Mordechai "Nuni" Mizrahi and Joseph "Yossi" Zalmanovich assisted petitioner in obtaining and distributing the cocaine. Eli Filin and Richard Parish were couriers who transported the cocaine shipments from Florida to Boston. Pet. App. A29-A31; Gov't C.A. Br. 4-9.

In June 1987, Filin stole a ten-kilogram shipment of cocaine by faking a robbery with an accomplice. Shortly thereafter, petitioner arranged for Filin to

deliver another shipment of cocaine to Boston. When Filin arrived, petitioner and Mizrahi escorted him to an apartment where two individuals known as "Moshe One" and "Moshe Two" were waiting. Filin was tied to a chair, beaten, and threatened with his life unless he told petitioner where the missing shipment was. Petitioner held a gun to Filin's head. Several days later, after he failed a lie detector test, Filin confessed and agreed to return the stolen cocaine to petitioner. Pet. App. A31-A33; Gov't C.A. Br. 9-12.

In February 1988, petitioner and Mizrahi met with Furer and the Florida suppliers to discuss purchasing larger quantities of cocaine. When those negotiations were unsuccessful, petitioner and his accomplices made arrangements to obtain cocaine directly from Colombian suppliers. Soon after the first shipment from Colombia was delivered, however, the conspirators were arrested. Pet. App. A37-A41; Gov't C.A. Br. 12-19.

2. On February 17, 1988, the district court authorized government agents pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1986, 18 U.S.C. 2510-2520, to intercept wire communications over a telephone subscribed to by co-defendant Eliahu Abramson at an apartment that he shared with petitioner in Brookline, Massachusetts. In his affidavit supporting the application for the wiretap order, DEA Agent Daniel Doherty informed the district court that the Hebrew language was likely to be used during the intercepted conversations and that the government was in the process of locating interpreters capable of understanding modern Hebrew. The agent stated in his affidavit that intercepted conversations in Hebrew would be recorded in their entirety and then minimized pursuant to 18 U.S.C.

2518(5) as soon as Hebrew interpreters became available.[1] Pet. App. A19-A22; Gov't C.A. Br. 89-93.

Between February 17 and March 5, 1988, the government recorded in full several telephone conversations in Hebrew. In the meantime, the government arranged to obtain the assistance of Israeli police officers to interpret the taped conversations. The Israeli officers arrived in Boston on March 1. They were briefed on wiretap procedures under Title III and began monitoring intercepted telephone conversations on March 5. In addition, the Israeli police officers reviewed the telephone conversations in Hebrew that had already been taped in full before March 5. In reviewing those conversations, the monitoring interpreters replicated the minimization procedure that would have taken place had the interpreter been monitoring the conversation when it was intercepted. That is, the interpreters listened to and interpreted only the portions of the conversations that related to the investigation; they stopped listening to the tapes when they determined that the conversations were about matters outside the scope of the investigation. Pet. App. A21-A24; Gov't C.A. Br. 94-98.

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[1] Section 2518(5) provides in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. * * *

Prior to trial, petitioner moved to suppress the Hebrew conversations that were taped in full between February 17 and March 5, 1988, on the ground that the government had failed to comply with the minimization requirements of 18 U.S.C. 2518(5). He argued that the after-the-fact minimization of those conversations by the Israeli police officers was not sufficient because the government had not demonstrated that Hebrew interpreters were "not 'reasonably available' " when it obtained the wiretap order. At the suppression hearing, the government explained that it had been difficult to obtain the required number of Hebrew interpreters because of the difference between the "common, everyday Hebrew" spoken by the conspirators and "biblical Hebrew," and because of the need for Hebrew interpreters who were familiar with the terminology of drug trafficking. The government also explained that using interpreters from the local area would have presented a security risk. The district court denied petitioner's motion to suppress. Pet. 11-14, 56-58; Gov't C.A. Br. 94-95.

3. For the offenses committed after November 1, 1987 (and therefore subject to the Sentencing Guidelines), the district court determined that petitioner's Sentencing Guidelines range was 292 to 365 months' imprisonment, based on an offense level of 40 and a criminal history category of I. In computing the offense level of 40, the district court included a two-level upward adjustment pursuant to Sentencing Guidelines § 2D1.1(b)(1) for the use of a firearm during the commission of at least one of the offenses. The court based the two-level adjustment on the evidence at trial showing that "[a] gun was used on more than one occasion." Pet. 41. In particular, the court noted the evidence showing that a gun was held to Filin's head when petitioner and his accomplices

questioned Filin about the stolen cocaine shipment in June 1987. Pet. 41-42 The court found that "the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that [petitioner] was responsible for its use." Pet. 42. See Pet. App. A82-A84, A86-A87; Gov't C.A. Br. 41-42.

4. The court of appeals vacated petitioner's convictions and sentences on the two drug conspiracy counts but affirmed his convictions and sentences on the other 20 counts. Pet. App. A1-A93. Relying on its decision in *United States* v. *Rivera-Martinez*, 931 F.2d 148, 152-154 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991), the court ruled that petitioner's separate convictions for the two drug conspiracy counts and the CCE count violated the Double Jeopardy Clause. Pet. App. A67-A68. But the court rejected petitioner's claim that the Double Jeopardy Clause barred his separate convictions on the counts charging substantive predicate offenses and the CCE count. It explained that, "unlike in situations where CCE and conspiracy counts are intertwined, Congress intended there to be separate punishments for both a CCE offense and any substantive predicate offenses." Pet. App. A69. The court therefore concluded that "the Double Jeopardy Clause does not prohibit conviction and sentence on both a CCE count and a count charging an underlying substantive act." *Ibid.*

The court of appeals also rejected petitioner's claim that the intercepted Hebrew telephone conversations should have been suppressed. Pet. App. A19-A24. It found that "after-the-fact minimization, which is expressly authorized by Title III, [was] appropriate" because "the evidence indicated that, despite reasonable, good-faith efforts, Hebrew interpreters were not available at all times." *Id.* at A22. The court also noted that "[t]he DEA's protocol was designed to replicate

what would happen in a contemporaneous minimization." *Id.* at A23. The court concluded that, "[b]y translating only the portions of the tapes that seemed relevant, the government's actions comported with the expectations of Congress * * * and were acceptable under Title III." *Id.* at A24 (citing S. Rep. No. 541, 99th Cong., 2d Sess. 1, 30 (1986)).

The court of appeals also upheld the district court's two-level increase in petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) as part of its calculation of petitioner's Guidelines range. Pet. App. A86-A87. It noted that the district court's factual findings were not clearly erroneous because "[t]he evidence obviously supports the finding that [petitioner] was responsible for the gun's use, whether or not he actually held the gun." *Id.* at A87. The court concluded that "[i]t was perfectly reasonable for the sentencing judge to conclude that, in brandishing a firearm (or causing one to be brandished) while trying to retrieve a stolen consignment of cocaine, [petitioner] was furthering the substantive offense related to that shipment." *Ibid.*[2]

5. The court of appeals denied a petition for rehearing. The court noted that the petition "focused exclusively upon the district court's upward adjustment of the guideline sentencing range to reflect the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge." Pet. App. A93-A94. The court declined to consider petitioner's argument that "the Sentencing Guidelines in effect at the time he was sentenced contained a lacuna making

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[2] The court of appeals also rejected numerous other claims by petitioner that he does not renew in this Court. See Pet. App. A7-A20, A24-A34, A53-A67, A77-A86.

the gun possession enhancement inapplicable to a CCE charge under 21 U.S.C. § 848," because petitioner had "failed to make the argument at the time of sentencing or to object to the presentence report on this basis." *Id.* at A94-A95.

ARGUMENT

1. a. Petitioner contends (Pet. 24-40) that even though he was subjected to only a single prosecution, the Double Jeopardy Clause prohibits separate convictions and cumulative sentences on a CCE count and on substantive drug counts that are predicate offenses of the CCE offense.[3] This Court's decision in *Garrett* v. *United States*, 471 U.S. 773 (1985), forecloses petitioner's contention. In *Garrett*, the Court held that separate convictions and cumulative punishment for a CCE offense and for the underlying substantive predicate offenses do not violate the Double Jeopardy Clause. The Court explained that, when only a single prosecution is involved, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 793 (quoting *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983), and *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981)). The Court in *Garrett* determined that "logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense." 471 U.S. at 795. In the wake of *Garrett*, the courts of appeals have uniformly held

[3] As an initial matter, petitioner's sentences were not "cumulative" in the ordinary sense of that term. He received concurrent, rather than consecutive, sentences on the CCE count and the substantive drug counts. See Pet. App. A6 n.2; Gov't C.A. Br. 3.

that separate convictions and cumulative punishment for a CCE offense and for the substantive predicate offenses do not violate the Double Jeopardy Clause.[4]

Petitioner's attempt (Pet. 30-31) to distinguish *Garrett* on its facts is unpersuasive. In *Garrett*, the defendant was first prosecuted for substantive drug offenses and later prosecuted for engaging in a CCE. In rejecting the defendant's argument that the Double Jeopardy Clause barred the successive prosecutions, the Court relied on the fact that the CCE in that case continued after the date of the indictment for the predicate offense. 471 U.S. at 790-793 (citing *Diaz* v. *United States*, 223 U.S. 442 (1912)). Petitioner argues that because the CCE offense in this case did not continue beyond the date of the last predicate offense, *Garrett* is inapplicable. But the portion of the Court's opinion on which petitioner focuses is the portion that deals with the problem of successive prosecutions; it is the portions that deal with cumulative punishment for a CCE offense and its underlying predicate offenses that are relevant here. In the portions of the opinion dealing with the cumulative punishment issue, the Court made clear that the Double Jeopardy Clause does not forbid the government from bringing a single prosecution that results in separate convictions and cumulative

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[4] See, *e.g.*, *United States* v. *Devine*, 934 F.2d 1325, 1345-1346 (5th Cir. 1991); *United States* v. *Rivera-Martinez*, 931 F.2d 148, 152-154 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991); *United States* v. *Morrow*, 929 F.2d 566, 567-568 (10th Cir. 1991); *United States* v. *Jones*, 918 F.2d 909, 910-911 (11th Cir. 1990); *United States* v. *Amen*, 831 F.2d 373, 381 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *United States* v. *Jefferson*, 782 F.2d 697, 701 (7th Cir. 1986); *United States* v. *Schuster*, 769 F.2d 337, 345 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); *United States* v. *Burt*, 765 F.2d 1364, 1369 (9th Cir. 1985).

sentences for both a CCE offense and for the substantive drug offenses that are predicates of the CCE offense. The Court explained that "[t]he rule stated in *Blockburger* [v. *United States*, 284 U.S. 299 (1932) is] applied as a rule of statutory construction to help determine legislative intent" and "is not controlling when the legislative intent is clear from the face of the statute or the legislative history." 471 U.S. at 778-779. The Court went on to conclude that "[t]he language, structure, and legislative history of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 * * * show in the plainest way that Congress intended the CCE provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses." *Id.* at 779. Because Congress intended separate punishments for the underlying substantive predicates and for the CCE offense, such cumulative punishment does not violate the Double Jeopardy Clause. *Id.* at 793-795.

b. There is likewise no merit in petitioner's claim (Pet. 35-40) that this Court should reexamine *Garrett* in light of Congress's enactment of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, and the increase in the penalties for CCE offenses provided in the Anti-Drug Abuse Acts of 1986 and 1988 (Pub. L. No. 99-570, 100 Stat. 3207; Pub. L. No. 100-690, 102 Stat. 4181). As petitioner notes (Pet. 29-30), the Court in *Garrett* drew some support for its conclusion that Congress intended cumulative punishment for a CCE offense and for the substantive predicate offenses from the fact that "disallowing cumulative sentences would have the anomalous effect in many cases of converting the large fines provided by § 848 into ceilings." 471 U.S. at 794. But there is no indication that the increased penalties for

the CCE offense enacted in 1986 and 1988 were intended to overturn the Court's decision in *Garrett* and announce Congress's intention to prohibit the common practice of charging and convicting defendants of both the CCE offense and its predicates in the same indictment.

2. Petitioner also contends (Pet. 40-54) that the court of appeals exceeded the scope of its authority to review sentences under 18 U.S.C. 3742 when it affirmed the two-level adjustment in his offense level under Sentencing Guidelines § 2D1.1(b)(1) for possession of a dangerous weapon during the commission of an offense. Petitioner does not dispute that the evidence that a gun was held to the head of the drug courier when he was questioned about the stolen cocaine shipment would justify an adjustment under Sentencing Guidelines § 2D1.1(b)(1). Rather, petitioner argues (Pet. 42-43) that the district court erroneously applied the firearm enhancement in this case because the incident related to a substantive drug offense that occurred before the effective date of the Sentencing Guidelines. But as the court of appeals indicated (Pet. App. A93-A94), the use of a firearm also related directly to the CCE offense, which continued after the effective date of the Sentencing Guidelines.

Petitioner asserts that the district court did not base the firearm enhancement under Section 2D1.1 (b)(1) on the CCE offense. In fact, the district court found that "[a] gun was used on more than one occasion," and that on one occasion a gun was held to Filin's head to induce him to return a stolen shipment of cocaine. The court further found that "the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that [petitioner] was responsible for its use." Pet. 42; Pet.

App. A82-A84, A86-A87. Although the district court could have stated more clearly that petitioner's use of guns furthered the CCE offense, there can be no doubt that petitioner's use of a gun to further the substantive offense of possession of cocaine with intent to distribute also furthered the CCE. The *raison d'etre* of the criminal enterprise was the distribution of cocaine. By using a gun to recover a large stolen shipment of cocaine, petitioner plainly furthered the CCE. In these circumstances, the district court's sentence was not imposed in violation of law or as a result of an incorrect application of the Sentencing Guidelines. And even if the district court's lack of precision is viewed as a misapplication of the Guidelines, the court's error could not have affected the sentence, and therefore was harmless. Accordingly, the court of appeals properly affirmed the sentence. See *Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992); Fed. R. Crim. P. 52(a).[5]

3. Finally, petitioner contends (Pet. 55-63) that the intercepted Hebrew telephone conversations that were recorded in full between February 17 and March 5, 1988, should have been suppressed because the government failed to carry its burden of justifying after-the-fact minimization of those conversations

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[5] Petitioner "does not press" his additional contention that the version of Guidelines § 2D1.1(b) applicable to his offense did not apply to a CCE offense. Pet. 49. The court of appeals declined to consider that argument because petitioner raised it for the first time in his petition for rehearing. Pet. App. A94. Moreover, the Sentencing Guidelines have now been amended to make it clear that the firearm enhancement applies to CCE offenses. See Sentencing Guidelines App. C, Amendment Nos. 139, 303 (Nov. 1, 1991). The amendments eliminate any need for this Court to resolve the issue whether the firearm enhancement of Section 2D1.1(b)(1) may be based on a CCE offense.

under Title III's minimization requirements, 18 U.S.C. 2518(5).

Title III expressly provides that "[i]n the event the intercepted communication is in a * * * foreign language, and an expert in that foreign language * * * is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception." 18 U.S.C. 2518(5). Here, petitioner's sole claim (Pet. 59) is that the government failed to carry its burden of showing that no expert in the Hebrew language was "reasonably available" for contemporaneous minimization of the intercepted telephone conversation between February 17 and March 5, 1988. Given the government's need for Hebrew interpreters who were familiar with everyday Hebrew as used by drug traffickers and who would not pose a security risk to the investigation, both courts below concluded that the government acted reasonably in obtaining the interpreters from the Israeli police. Cf. *Scott* v. *United States*, 436 U.S. 128, 140 (1978). Petitioner's fact-bound claim to the contrary does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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Attorney

MAY 1992

Supreme Court, U.S.
FILED
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No. 91-1380

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITION'S REPLY BRIEF

SHMUEL DAVID has petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on July 29, 1991, upholding petitioner's convictions and sentences for CCE and substantive drug offenses under the Sentencing Reform Act and prior law. United States v. David, 940 F.2d 722 (1st Cir. 1991); Appx. A. His petition offers three reasons why the writ should be granted:

>(1) The court below misapplied Garrett v. United States, 471 U.S. 773 (1985), to permit cumulative conviction and sentencing where a defendant's Continuing Criminal Enterprise does not continue in time beyond the date of indictment for the CCE's predicate

offenses, and despite subsequent, critical changes in the federal drug and sentencing laws;

>(2) In upholding a firearm enhancement on a basis not relied upon by the prosecutor or the district court, the court of appeals so departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power; and

>(3) The question whether the exception in Title III, the wiretapping statute, permitting after-the-fact minimization of foreign language conversations where an expert is "not reasonably available" during interception can be satisfied where the government assumes that it must import a police officer from the foreign country, without making any effort to obtain an expert in the United

States, is important and calls for resolution by this Court.

In opposition, the United States contends that the first question is settled by this Court's decision in Garrett; that the district court actually imposed the sentence enhancement on a basis it never stated, or that it so clearly would have that its failure to do so was harmless; and that the third question is routine and fact-bound. None of the government's arguments has merit. The petition should be granted.

To further its position, the Brief in Opposition (hereinafter "BO") restates each of the Questions Presented so as to obscure its significance as a basis for certiorari. A comparison of the Questions as stated by the petitioner with the respondent's counterstatements will show that the respondent has not really

attempted to clarify or correct the questions but rather has crudely sought to conceal from this Court the general significance of each question.

1. Double Punishment. On the first issue, the respondent simply ignores the substance of each point made in the petition. The respondent also pretends that there is no doctrinal connection between the analysis of whether cumulative punishment is allowable for two related offenses and whether those offenses are the "same" so as to bar successive prosecution under the Double Jeopardy Clause. BO 9. This Court's cases, as quoted and applied in the petition (Pet. 32-33) but not even mentioned in the Brief in Opposition, make clear that the respondent is wrong.

Garrett left open the question presented in the petition, and the

continuing viability of that decision is placed in question by subsequent legislation. Accordingly, the writ should be granted to address the first question.

2. Improper Affirmance of Guideline Sentence Imposed on Unlawful Basis. The respondent concedes that the two level gun enhancement under the sentencing guidelines, costing the petitioner an additional six to ten years' imprisonment, could not be justified on the basis given by the district court. Instead, the respondent seeks to defend the disposition below, which justified the enhancement on a different basis, outside the power of a court of appeals. BO 11-12; Appx. A94-95.

The argument made in the petition anticipated this Court's March 9 decision in Williams v. United States, 503 U.S. --,

112 S.Ct. 1112, 117 L.Ed.2d 341 (1992); at the least, this petition should be summarily granted and the case remanded to the court of appeals for reconsideration in light of that decision. Williams allows a court of appeals to find harmless error where a discretionary departure decision is predicated on two bases, one valid and the other improper; it does not permit a court of appeals to construct its own fact-based rationale for the sentencing decision, never articulated by the sentencing judge, and then affirm on that different basis.

And even if Williams ever would allow such a disposition, it is not for this Court, contrary to the respondent's contention (BO 12), to decide in the first instance that the district court's error was "harmless." Williams -- which remanded because this Court could not

determine whether the court of appeals had considered the possibility of harmless error under the proper standard, 117 L.Ed.2d at 357 -- holds directly to the contrary.

Accordingly, this Court should grant the writ on the second question for the reasons stated in the petition -- and to address the rationale of Williams as it pertains to guideline application issues which are not discretionary (like the departure involved in that case) but have factual predicates not ~~made~~ found by the sentencing judge. At the least, this Court should summarily grant the writ and remand for further consideration in light of Williams. At the same time, the Court should direct the court below, in the course of that reconsideration, to entertain the merits of the petitioner's arguments (Pet. at 48-49 nn. 9-11) that

applying the two-point enhancement to the CCE is legally impossible.[1] That point simply cannot have been "waived," as the court of appeals held on rehearing, Appx. A94-95, when no occasion to discuss it had ever arisen in the district court.

3. Contemporaneous Minimization of Wiretap. Petitioner's third point is not a "fact-bound claim" (BO 13) that the efforts made in this case to obtain interpreters to aid in the wiretapping were not reasonable. Here, no effort was made at all. The point is rather that to permit an assumption about the loyalties

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1. The respondent misrepresents the petitioner's position on this point. BO 12 n.5. Petitioner said he "did not press" the lower court's error in applying the firearm enhancement to the CCE count as a separate ground to grant certiorari. Never have we suggested that the court of appeals' ruling was other than clearly and blatantly erroneous on the merits.

and reliability of the many immediately-available Hebrew speaking interpreters to be upheld as satisfying 18 U.S.C. § 2518(5) so far departs from reason and fundamental principles as to require correction. The writ should be granted on the Title III issue as well.

CONCLUSION

For each of the reasons given in his petition, as amplified above, Shmuel David prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the

First Circuit affirming his convictions and sentences on all but the conspiracy counts of the superseding indictment in this case.

Respectfully submitted,

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May 18, 1992.